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The Brazilian Model of Precedents a New Hybrid between Civil and Common Law?

Alves Dias De Souza, Marcelo

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PhD Thesis

**The Brazilian Model of Precedents: a New
Hybrid between Civil and Common Law?**

Marcelo Alves Dias de Souza

A thesis submitted for the degree of Doctor of Philosophy
King's College London – KCL
The Dickson Poon School of Law

2013

Declaration

I certify that the thesis I have presented for examination for the PhD degree of the King's College London - KCL, The Dickson Poon School of Law, is solely my own work other than where I have clearly indicated that it is the work of others (in which case the extent of any work carried out jointly by me and any other person is clearly identified in it).

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Marcelo Alves Dias de Souza

Acknowledgements

My first thanks go to Dr Eva Steiner and Dr Lorenzo Zucca, my supervisors at the King's College London – KCL, The Dickson Poon School of Law. They are, each in their own way, responsible for the submission of this thesis.

I also wish to express my gratitude to Dr Duncan Fairgrieve and Dr Teresa Wambier, the examiners of my PhD, for their challenging evaluations my thesis.

I must thank, for all the support in London and/or the reading of this thesis, Damian Fitzpatrick, Clare Canton, Jess Yeong, Renata Barreto, Hidji Helinski, Charles Phelan and Mônica Reis.

I reiterate my thanks to the Brazilian Federal Public Prosecution Service (Ministério Público Federal do Brasil), including my colleagues and all the staff, who stoically endured my absence to conduct my research in Britain.

My thanks also go to the King's College London – KCL and the University of London, safe ports in my long journey overseas. I will miss my friends and the books I found on shelves of the Strand Campus, the Maughan Library and the Library of the Institute of Advanced Legal Studies (IALS).

I must also thank my parents: thank you for what you gave and still are giving to me.

Finally, my thanks to the true Creator.

Marcelo Alves Dias de Souza

Abstract

This thesis offers, in response to the challenges of a globalised world, a coherent systematisation of the Brazilian model of precedents as a new hybrid between civil and common law. Conceptual and broadly comparative (constantly drawing knowledge from the English common law), it presents how precedents are understood and how they operate in Brazil. This thesis systematises the concepts and establishes a consistent vocabulary for the categories of creativeness, declarativeness, persuasiveness and bindingness of precedents, which can then be comprehended by both Brazilian and English audiences. In addition, it creates a unique reference to be applied in the comparative study throughout the thesis. This thesis also analyses the practical uses of precedents in Brazil and then compares them to the English model. It discusses how judges in Brazil deal with concepts such as the *ratio decidendi*, the distinguishing and the overruling of precedents. As the last few decades in Brazil have seen a clear increase in the use of precedents in terms of frequency, creativity and bindingness, this thesis offers a comprehensive taxonomy of the several Brazilian binding precedents that are expected to progressively transform the Brazilian approach to precedents into an example of a hybrid model. This thesis focuses on the new and very important Supreme Court's Binding *Súmula* (a category of binding precedent introduced into Brazilian law by Amendment 45 to the Federal Constitution, passed in 2004), analysing its origins, features and significance under a dual perspective that could be interesting for both common and civil law traditions. This thesis finally focuses on some of the advantages of the doctrine of *stare decisis* – stability, certainty of law, equality, time-saving –, as positive criteria of functionality, in order to analyse improvements in the deliverance of justice in Brazil since the adoption of a more comprehensive approach to binding precedents. The last chapter also presents and debates some strengths of the new Brazilian approach to precedents, emphasising that the Brazilian mix of civil and common law elements has proven to be a very synergic model. Identifying many of the problems of Western precedent models as well as suggesting some solutions, this thesis aims to be used as a tool for both researchers and those dealing with law reform and to contribute to the development of the theory of precedents in both civil and common law legal worlds.

Keywords: 1 – Conceptualism. 2 - Comparative Law. 3 - Common Law. 4 - Civil Law. 5 - Theory of Precedents. 6 - Brazil.

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The Brazilian Model of Precedents: a New Hybrid between Civil and Common Law?

1 Introduction

1.1 Measuring the Importance of Precedents from a Mixed Common and Civil Law Perspective

(i) *The Importance of Studying Precedents*

The aim of this thesis is to offer, in response to the challenges of a globalised world, a coherent systematisation of the Brazilian model of precedents (a new hybrid between civil and common law?), conceptual and broadly comparative (mainly with the English model), presenting how precedents are understood and how they operate in that country.

This thesis assumes that the theory of precedent is, for many reasons, a very controversial theme which deserves to be a subject of thought under a unified perspective of both common and civil law families.^{1,2} The first reason is that judicial precedents^{3,4} are found in any legal system. In any country, independently of its

¹ According to Cotterrell, the idea of legal families “suggests that different state legal systems, or central elements of the legal doctrine within them (including styles of developing and presenting doctrine, and of legal reasoning and interpretation), can be treated as having sufficient similarity to make comparison fruitful. At the same time, it suggests that these comparable systems or system elements treated as a group can be distinguished from others treated (...)”. See Cotterrell, Roger. *The Concept of Legal Culture*. In Nelken, David (ed). *Comparing Legal Cultures* (Aldershot/England, Dartmouth, 1997), p. 13.

² The legal world is not seen here as a simple division between the common law and civil law traditions as if nothing else exists. There are other traditions beyond the Western world, although there are also considerable disagreements about the number and their frontiers. See Edge, Ian. *Comparative Law in Global Perspective*. In Edge, Ian (ed). *Comparative Law in Global Perspective* (Ardsey/NY, Transnational Publishers Inc., 2000), p. 7. However, in enterprises like this, it is imperative to not lose the focus and therefore the focus is based on the Western tradition.

³ The meaning of the term “precedent” in a non-legal perspective is easily understandable. According to *The Oxford English Dictionary*, precedent means “a thing or person that precedes or goes before another; that which has been mentioned just before; that which precedes in time; something occurring before; an antecedent”. See Oxford University. *The Oxford English Dictionary*, vol 8 (Oxford, Clarendon Press, 1933), p. 1243.

⁴ In legal terms, a “precedent” can be defined as “an adjudged case or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law”. See Black, Henry Campbell. *Black’s Law Dictionary* (6th ed, St. Paul, West Publishing, 1990), p. 1176. Focusing on the question of persuasiveness or bindingness of judicial precedents, Walker defines them as “previous decisions of the superior courts deemed to embody a principle which in a subsequent case raising the same, or a closely related, point of law, may be referred to as stating or containing the principle which may be at least influential on the court’s decision of it, or even, under the principle of *stare decisis* (q.v.), decisive of it. A precedent, that is, is a previous judicial

connection to a specific family of law, a decision made by a court in a previous case constitutes a precedent for similar cases, although its attributes, such as its creative or merely declarative power, its persuasive or obligatory character, shall depend on the contours attributed to it by the established judicial system.⁵ The second reason is the relevance of judicial precedents to the law: legislation, legal writing and law teaching – all have as destination the courts that pronounce the final word on what the law is. The third and most important reason, the topic has not yet been thoroughly investigated from the perspective of the civil law tradition, as opposed to the tradition of common law. Therefore, as far as civil law countries are concerned, such as the Brazilian case with its peculiar approach to precedents, there is an enormous field to investigate.^{6,7,8}

This thesis constantly highlights the Brazilian mix of civil law and common law elements that has proven to be a very synergic model. Being a critical evaluation on the frontier of common and civil law traditions, this thesis aims to present an innovative vision to precedents that can be useful indistinctly in all countries related to the Western legal tradition.⁹

(ii) The Current Mixture of Common Law and Civil Law Traditions

decision considered as a source of law in later cases". See Walker, David Maxwell. *The Oxford Companion to Law* (Oxford, Clarendon Press, 1980), p. 977.

⁵ See Summers, Robert S. *Essays in Legal Theory* (Dordrecht, Boston and London, Kluwer Academic Publishers, 2000), p. 206.

⁶ This is recognised by Bustamante as a general characteristic of the civil law countries. See Bustamante, Tomas da Rosa de. *Uma teoria normativa do precedente judicial: o peso da jurisprudência na argumentação jurídica* (Tese Doutorado, Pontifícia Universidade Católica do Rio de Janeiro – PUC/RJ, 2007), pp. 220-221.

⁷ A rare example of deep investigation of the subject based on a civil jurisdiction (specifically Russia) is Vereshchagin, Alexander. *Judicial Law-Making in Post-Soviet Russia* (Abingdon/UK, Routledge-Cavendish, 2007).

⁸ See also Souza, Marcelo Alves Dias de. *Do Precedente Judicial à Súmula Vinculante* (Curitiba, Juruá, 2006), pp. 16-17.

⁹ The idea of west is used in this thesis, as does Goldman, to locate, culturally, the legal phenomena occurring in Western Europe and its colonial offspring. England, whilst geographically isolated from continental Europe, is, undoubtedly, part of this world. This Western law tradition includes, for instance, Western European countries, the United States of America, Canada, Australia and South America countries, like Brazil. See Goldman, David. *Globalisation and the Western Legal Tradition* (Cambridge, Cambridge University Press, 2007), p. 4.

It is known that common law¹⁰ and civil law¹¹ are two of the most important legal traditions in the world, each with their own origin and development. However, in spite of having different origins, countries related to the tradition of civil law and countries connected to the tradition of common law have had many contacts with one another over the centuries. These contacts have recently become increasingly narrower in scope and this new reality touches on long-established truths.^{12,13}

While in the past, in common law tradition, decisions in cases were rarely influenced by statutes, today the legal system of any country related to this tradition demands that the judges also investigate legislation. This is constantly growing to include an increasing amount of new situations.¹⁴ As a matter of fact, within the English legal system¹⁵ as well as the systems of other countries related to the tradition of common law, the law is being legislatively normalised with the passage of time and nowadays it is difficult to find a judicial decision that makes no reference to statutes. There are those who say that both English and American law, for example, are about to enter (if they have not done so) an era of statutes, in which statutes have almost the same role as they have in countries that are related to the Roman-Germanic tradition.^{16,17} Besides, in recent times, a series of restatements has been

¹⁰ With regard to the historical patterns of the common law tradition, see Glenn, H. Patrick. *Legal Traditions of the World: Sustainable Diversity in Law* (2nd ed, Oxford, Oxford University Press, 2004), pp. 222-270.

¹¹ About the historical development of the civil law tradition, see Glenn (2004, pp. 125-169) and Merryman, John Henry. *The Civil Law Tradition: an Introduction to the Legal Systems of Western Europe and Latin America* (2nd ed, Stanford/CA, Stanford University Press, 1985).

¹² In terms of Europe, as Bustamante says (2007, p. 27), these contacts are strongly influenced by the reality of the European Union.

¹³ It should never be forgotten that, in both traditions, the law has gone through the influence of strong Christian morality. The same philosophical doctrines have been in place, since the beginning of the Renaissance: individualism, liberalism and the notion of subjective rights. The substance of the law – and here we are speaking of the conception of justice, which is in both cases the same – imposes similar solutions for legal questions in both families of the law.

¹⁴ See Gunasekara, Gehan and Sims, Alexandra. Statutory Trends and the "Genetic Modification" of the Common Law: Company Law as a Paradigm (2005) 26(2) *Statute Law Review – Stat LR*, pp. 83-85.

¹⁵ The English precedent system covers England and Wales. However, just to facilitate understanding, the expressions "English system" and "England" will be used.

¹⁶ In the now distant year of 1982, from class notes taken in 1977, Guido Calabresi published "A Common Law for the Age of Statutes", which won a praise of the American Bar Association, focusing on this issue and demonstrating that Parliaments in common law countries have more often produced statutes. See Calabresi, Guido. *A Common Law for the Age of Statutes* (Cambridge/MA, Harvard University Press, 1982).

¹⁷ In the United States of America, this phenomenon is observed by Re who points out that there,

produced that act as a type of “pre-codification” in the European style, without, however, official authority.¹⁸ This has occurred, in part, due to the growing number of precedents that make it excessively laborious to consult these sources of the law, and in part due to the considerable increase in the number of statutes in common law countries (above all in the American system).¹⁹ These restatements are seen by many as the predecessors of official codes that will come to exist in the future.^{20,21,22}

In turn, in the countries that adopt the tradition of civil law, the opposite is happening. It is already recognised that a system that strictly adheres to legislation,

currently, the legislation embraces almost all the areas of law so extensively, both public and private, that it cannot be presupposed anymore that the starting point is a judicial precedent. Commonly, the starting point must be the legislative politics expressed by a meaningful legal text. The courts, naturally, must interpret and apply the legislation. See Re, Eduard D. Stare Decisis. *Revista Jurídica*, n. 198, abr. 1994, p. p. 31.

¹⁸ As Jansen states: “The most important of such reference texts are the American Restatements of the law, which have become a major textual authority of the American common law. Today, large parts of the law have been restated, and the Restatements are taken by the participants to the legal discourse as a valid expression of the law. During the last decades, the American Restatement approach has also influenced the developments of transnational restatements of the law. The International Institute for the Unification of Private Law (UNIDROIT) has largely applied the terminology and formal style of the American Restatements for its *Principles of International Commercial Contracts*; and a similar approach was taken, on the European Level, by the Lando Commission on European Contract Law. Today, the Restatements’ formal style is used by the Study Group on a European Civil Code and by the Acquis Group, the main non-legislative actors in the current political process of unifying European private law”. See Jansen, Nils. *The Making of Legal Authority: Non-legislative Codifications in Historical and Comparative Perspective* (Oxford, Oxford University Press, 2010), p. 50.

¹⁹ About restatements, see also Twining, William. *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge, Cambridge University Press, 2009), pp. 306-312.

²⁰ Anticipating this, since 1999, England has a kind “Code of Civil Procedure” under the official denomination of Civil Procedure Rules (CPR). Replacing the previous fragmentary rules, and departing from the long national usage, the new legislation regulates the matter in systematic and comprehensive terms (with the exception of the appealing and execution procedures). It is authentic novelty that can be considered as the greatest legislative transformation in this field for more than a century.

²¹ In truth, this idea of codification of the common law is not original. Two centuries ago, a political project of Bentham was to reform the entire legal system based on the idea of codification. Bentham, it is said, detested case law, because, for him, it was pure judge-made law, which represented all the worst that is in common law systems: a shape without defined borders. Bentham launched a very influential, despite unsuccessful, campaign to codify the common law, designed to reach legal certainty removing the judges’ discretion to create law. See Bustamante (2007, pp. 89-90).

²² Arguments in favour of the codification are broadly known (mainly under the civil law tradition). Codes can be described, as Samuel does, “as maps of law”. See Samuel, Geoffrey. Civil Codes and the Restructuring of the Common Law. In Fairgrieve, Duncan (ed). *The Influence of the French Civil Code on the Common Law and Beyond* (London, British Institute of International and Comparative Law, London, 2007), p. 91. To Steiner, despite some scepticism that has been expressed, “codification carries with it a certain number of advantages which have been identified primarily as accessibility/comprehensibility and consistency/certain”. See Steiner, Eva. *French Law: a Comparative Approach* (Oxford, Oxford University Press, 2010), p. 44. See also Vidal, Félix M. Calvo. *La Jurisprudencia: fuente del Derecho?* (Valladolid, Lex Nova, 1992), p. 17.

be it codified or not, as the only source of law, proves to be, at the present time, an insufficient one. In truth, the advantages and disadvantages of the common law are somewhat symmetrical to the civil law. While the former requires the adoption of general and abstract rules in order to give a more systematic approach to law, the second commonly lacks the binding precedent and the concretism provided by the case law to better define the abstract patterns of the conducts regulated by statutes and codes.²³

Currently there is nothing more equivocal than to imagine that the judges are, in absolute terms, only connected to statutes in a legal system related to the tradition of civil law or that they are only connected to precedents in a system that belongs to common law. Many areas of law in the legal systems of both traditions are shaped by the Parliament but in all of those legal systems, to a greater or lesser degree, judges rely on precedents.²⁴ As Vereshchagin says, the question of following statutes or precedents, only one or the other, is mistaken.²⁵ In both worlds of civil and common law, it is necessary to consult statutes and previous judicial decisions. Only in the former, consultation of statutes is done first; in the latter, the first sources to be consulted are judicial decisions. Nevertheless, in the end, in both cases they finish working with both statutes and precedents jointly.

(iii) The Brazilian Experience

Despite having followed the tradition of civil law and thus having statutes as the first formal source for the application of the law, Brazil has not been immune to the influence of binding precedents. Historically, motivated by a variety of factors, which include to reach a uniformity of understanding on legal questions and to guarantee greater speed in judicial decisions, Brazil has fixed types of decisions or sets of decisions that have formal bindingness.²⁶

²³ See Losano, Mario. *Os grandes sistemas jurídicos* (Marcela Varejão tr, São Paulo, Martins Fontes, 2007), pp. 336-337.

²⁴ See Summers (2000, p. 210): "Thus the frequent caricatures of civil law judges are entirely free from the shackles of precedent while the common law judges are enslaved to their own past (or engaged in 'preserving the good old order') are not even remotely accurate today, if they ever were".

²⁵ See Vereshchagin (2007, p. 113).

²⁶ As will be seen in Chapter 4, it is possible to find types ranging from the result of the incident for case-law standardisation that binds a court's panel, going through the decisions endowed with a binding effect on concentrated judicial review of legislation, going to quasi-legislative acts (such as the

However, with globalisation^{27,28}, the facility of communications and the greater cultural exchange, the absorption of common law categories – including binding precedents – has, visibly, intensified.²⁹ The last few decades in Brazil have also seen a natural increase in the use of precedents in terms of frequency and creativity. Currently, judicial decisions rather infrequently refer only to the Constitution or the relevant statutes, and precedents are quoted even when the legal issue is “covered” by legislative provisions.

Nevertheless, Brazilian lawgivers and academics have attempted to develop a system of binding precedents in which the concepts and *modus operandi* are also compatible with the Brazilian historical, philosophical and legal backgrounds (connected with the civil law). The recent creation of a Binding *Súmula* (“*Súmula Vinculante*”, in Portuguese) in the Brazilian Federal Supreme Court, via constitutional reform (by Constitutional Amendment 45/2004), is a perfect example of this intense cross-cultural exchange.³⁰ Progressively, it is believed, concerning the use of precedents, Brazil will become a new example of a mixed system^{31,32} or what might be known as a country related to this “new” Western legal family.

normative sentences of the Labour Courts).

²⁷ As Twining says: “In the present context the term ‘globalisation’ refers to those processes which tend to create and consolidate a unified world economy, a single ecological system, and a complex network of communications that covers the whole globe, even if does not penetrate to every part of it. Anthony Giddiness characterises the process as ‘the intensification of world-wide relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa’. See Twining, William. *Globalisation and Legal Theory* (London, Butterworths, 2000b), p. 4.

²⁸ About globalisation and law, in a broader and deeper sense, see Santos, Boaventura de Sousa. *Toward a New Legal Common Sense: Law, Globalisation, and Emancipation* (2nd ed, London, Butterworths LexisNexis, 2002).

²⁹ See Wambier, Teresa Arruda Alvim. Precedentes e evolução do direito. In Wambier, Teresa Arruda Alvim (coord). *Direito jurisprudencial* (São Paulo, RT, 2012), p. 86.

³⁰ As will be seen in detail in Chapter 5, this Binding *Súmula* represents the Federal Supreme Court consolidated case law and is constituted by numbered statements committed to defined legal themes. Each statement presents the consolidated understanding of the Supreme Court about determined questions of the law. These statements have to be followed by the others courts and administrative agencies.

³¹ Mixed is intended in a “classical” way in this thesis, meaning, as Castellucci states, “the coexistence of both the civil law and the common law traditions with their typical legal features, both identifiable in the system in an obviously relevant amount”. See Castellucci, Ignazio. How Mixed Must a Mixed System Be? (2008) 12(1) *Electronic Journal of Comparative Law - EJCL*, p. 4 <<http://www.ejcl.org/121/art121-4.pdf>> accessed 20 July 2012.

³² About the role of precedents in mixed systems, see McGonigle, Ryan. The Role of Precedents in Mixed Jurisdictions: a Comparative Analysis of Louisiana and the Philippines (2002) 6(2) *Electronic Journal of Comparative Law – EJCL*, pp. 1-25 <<http://www.ejcl.org/62/art62-1.html>> accessed 20 July 2012.

Considering the Brazilian experience, it is possible to raise some challenging questions about the theory of precedents.³³ This thesis will address them using a cross-cultural vision of this field of law, aiming to play, using Castellucci's words, "a role in developing a civil law/common law dual legal language for the Western world".³⁴

After all, as the same Castellucci states:

The mix of civil law and common law identifiable in 'classical' mixed systems works reasonably well, in principle, as basic ideas about law are shared in both of its components; it has often proved a very synergic mix, as clearly demonstrated by the fact that many or almost all of the Western legal tradition systems seem to more or less converge towards a similar mixed model.³⁵

1.2 Methodology: Conceptualism and Comparative Law as Tools

(i) Language and Conceptual Problems Involving a Cross-Cultural Approach to Precedents

Law is more closely linked to language than it is normally considered and vocabulary is an "ideal" area for misunderstanding.³⁶ Furthermore, if human language, no matter what language we are referring to, is an imperfect vehicle for the expression of legal concepts, those who compare "suffer to a greater extent from ambiguities of language than the lawyers of the system in which the ambiguities occur, because they cannot always be expected to be aware that a foreign legal term is not well defined".^{37,38}

³³ Twining (2000b, p. 7) is correct when he believes "that the world is increasingly interdependent, that the significance of national boundaries and of nation states is changing rapidly, and that one cannot understand even local law by adopting a purely parochial perspective". And the same Twining (2009, p. 449) later recommends: "Extending the canon and reducing our ignorance of other traditions. (...) That is a pre-condition for genuine cross-cultural dialogue and for serious aspirations to universalism".

³⁴ Castellucci (2008, p. 17).

³⁵ Castellucci (2008, p. 14).

³⁶ See De Cruz, Peter. *A Modern Approach to Comparative Law* (Deventer/The Netherlands, Kluwer Law and Taxation Publishers, 1993), p. 35: "Whereas physicians, chemists, economists, mathematicians and musicians have a common vocabulary, legal terminology is fraught with linguistic traps and is a potential minefield of misunderstanding; meanings vary from country to country. (...). Even in English-speaking countries, homonyms may have different meanings. Hence, even if the basic legal concepts are similar, different terms may be utilised so as to create an impression of divergence and this may occur within the same legal family".

³⁷ See Gutteridge, H. C. *Comparative Law: an Introduction to the Comparative Method of Legal Study*

It is extremely common (and dangerous) that in different legal systems an identical or similar expression denotes quite diverse legal categories or concepts.^{39,40} For instance, “there are certain terms in every system of law which cannot be translated into another language *simpliciter* but must be explained at some length”⁴¹ and “the use of an identical or similar term in the legal terminology of the two countries does not guarantee comparability”.⁴² Besides, some terms or phrases from Anglo-American law seem to have been created only to confuse the civil lawyer. But, in this field, the difficulties are mutual. On the other hand, Anglo-American lawyers do not feel comfortable with several terms that are used by those involved with the civil law tradition.

However, in spite of the fact that there is no official comparative language and no magic solution to this problem, language remains one of the main tools of comparative lawyers. Consequently, in this work, it is necessary to deal with terms which are found in several systems of law and consider the possible meanings or variations that these terms can have in each system of law. Language is an important factor for this research and it is fundamental to deal with it correctly.⁴³

With this in mind, this thesis constantly calls into question how much the theory of precedents is influenced by a particular language and vocabulary and what happens when a certain legal term is translated into a different language, in order to deal with concepts and terms in a consistent manner. The difficulties that this proposal involves, of course, are undeniable. However, an attempt to minimise such problems of expression shall be a matter for attention of a comparative study dealing with the theory of precedents.⁴⁴

and Research (2nd ed, London, Wildy & Sons Ltd., Reprinted 1971), p. 119.

³⁸ Concerning (in)coherence in comparative law, see Andenas, Mads and Fairgrieve, Duncan. Introduction: Finding a Common Language for Open Legal Systems. In Canivet, Guy; Andenas, Mads and Fairgrieve, Duncan (eds). *Comparative Law before the Courts* (London, British Institute of International and Comparative Law, Reprinted 2005), p. xxix.

³⁹ See Gutteridge (1971, p. 118)

⁴⁰ See Bogdan, Michael. *Comparative Law* (Deventer/The Netherlands, Kluwer Law and Taxation Publishers, 1994), p. 59.

⁴¹ See Gutteridge (1971, p. 125).

⁴² See De Cruz (1993, p. 4).

⁴³ See Grossefeld, Bernhard. *The Strength and Weakness of Comparative Law* (Oxford, Clarendon Press, 1990), p. 85.

⁴⁴ See Gutteridge (1971, p. 122): “The present position in regard to legal terminology is one which seems to call for action. It is not only of great practical importance that some remedy should be found

Along with the terminological difficulties, a second problem that this thesis will have to deal with is the absence of univocal concepts⁴⁵ for the categories utilised in the theory of precedents, which can be applied in both civil and common law traditions.⁴⁶

As a matter of fact, as this thesis is concerned with analysis of both terms and concepts, it is crucial to have in mind the words of Twining:

They are intimately related, for one uses words to label concepts, but it is important to keep them conceptually distinct. For example, a term may 'travel', but become attached to a different concept; the same word may refer to more than one concept; I may have a concept but be unable to express it in words; words may imperfectly capture a concept.⁴⁷

Besides, concepts represent realities or ideas from the world of nature or the world of culture, the world of causality or the world of values and, unfortunately, they can be vague. Vagueness in concepts of the theory of precedents inside a national legal system is less common than in comparative law, not only because one idiom is used but also because the legal fabric decreases the vagueness of these concepts. Positive law – statutes or case law – presents points of reference that circumscribe the ambiguousness of the terms and expressions used, and the lawyer, utilizing these subsidies provided by the positive law and by the context of the system as a whole, can find the marks that delimit the realities or ideas that the established concepts actually refer to.⁴⁸ In terms of comparative law, the theory of precedent, along with some concepts of precise and univocal meaning, presents many imprecise and fluid concepts⁴⁹, because in the world of comparative law there is not a unique positive law that combines the realities under certain categorization.

for the existing state of affairs, but something must also be done to relieve the comparative lawyer, as far as is feasible, from the linguistic problems which press upon him".

⁴⁵ See Twining, William. Have Concepts, Will Travel: Analytical Jurisprudence in Global Context (2005) 1(1) *International Journal of Law in Context* – IJLC, p. 6: "Concepts are important as thinking tools at all levels of practical legal activity as well as in academic law and legal philosophy".

⁴⁶ In this thesis, it is assumed that the readers have some experience or knowledge about the theory of precedent. It does not discuss in all detail the basic aspects of this theory, preferring to go directly to the terminological, conceptual, methodological and functional most relevant controversies.

⁴⁷ Twining (2005, p. 6).

⁴⁸ See Mello, Celso Antônio Bandeira de. *Curso de Direito Administrativo* (São Paulo, Malheiros, 2008), p. 974.

⁴⁹ See De Cruz (1993, p. 35): "Conversely, although the terms used may be identical, their substantive content or actual application in practice may be quite different. An example of an identical term which is common to two jurisdictions with the same legal family is *stare decisis* (let the decision

(ii) Systematising Concepts

This investigation, as any modern comparative law study should, needs to have a systematic basis to produce valid findings. Any comparison drawn between national systems of law or categories of these systems without a prior conceptual framework may be arbitrary⁵⁰. In fact, as suggested by Twining, in this era of globalisation, comparative law involves all of the fundamental tasks of legal theory, including synthesis, construction and elucidation of concepts, which has been the traditional concern of analytical jurisprudence.^{51,52}

To achieve these aims, Chapters 2 and 3 critically and comparatively call into question the role of judicial precedents in the formulation of Brazilian law and discusses the meaning of creativity, mere declarativity, persuasiveness and bindingness of precedents. These two chapters also try to approximate civil and common law views with respect to the theory of precedent, suggesting a set of cross-cultural concepts and terminology to be used mutually in this area of law: the study of categories such as *ratio decidendi* and *obiter dictum*, distinguishing, overruling, among others, will be a fundamental part of this work. Dealing with

stand). Both American and English Legal systems have adopted a doctrine of *stare decisis* but their actual operation within their individual jurisdictions are 'markedly different' (see Atiyah and Summers (1987)). The essential difference between American and English practice is that the lower courts in America are not bound to follow their own decisions, and the authority of a court's own prior decisions depends largely on the persuasiveness of the reasoning of the earlier court. Unlike English courts, in America, subsequent judges at all levels have the power to disregard otherwise binding decisions (see Atiyah and Summers (1987) pp.113-34). Thus, a 'binding' decision may not be absolutely binding because the court may believe that the previous ruling was clearly wrong when delivered, or inappropriate to different factual conditions or the compositions of the court may have changed so that the majority view became the minority one".

⁵⁰ See Watson, Alan. *Legal Transplants: an Approach to Comparative Law* (Edinburgh, Scottish Academic Press, 1974), p. 7.

⁵¹ Twining (2000b, p. 189-190).

⁵² Twining (2005, p. 10) states: "The term 'analytical jurisprudence' is sometimes treated as co-extensive with 'linguistic analysis', or with elucidation of abstract concepts. This is too narrow. It is true that elucidation of abstract concepts was the main focus of attention of some analytical jurists in the Anglo-American tradition, including Austin, Holland, Hohfeld, Kocourek and Salmond. However, it has not been their only concern. For example, Hart treated a number of other topics as part of analytical jurisprudence, including the study of the form and structure of legal systems, problems of legal reasoning, and problems of definition of law (Hart, 1967; 1983). Hart also made it clear that he considered that critical analysis of assumptions and presuppositions of legal discourse was one of the main tasks of legal philosophy (Hart, 1987, pp. 35, 40). This broader view accommodates contemporary jurists such as Raz, MacCormick and even Dworkin, who assimilated some of the techniques of conceptual analysis developed by analytical philosophers, including Hart, but moved on to deal with what they considered to be issues of substance".

conceptual categories in the diversity of the different national precedent models, the goal here is to transform this material into something logical and intelligible.⁵³ Chapter 4, in turn, presents a comprehensive systematisation of the several categories of binding precedents in the Brazilian legal system. The proposal is to catalogue, distinguish, and classify the concepts, establishing secure references to any further steps. In the process of systematisation of concepts, the knowledge previously produced by philosophers of law, comparatists and philosophers in general will be used, in order to keep a consistent link and not to produce more conceptual errors.

Conscious of the impossibility of avoiding all vague or ambiguous concepts, the purpose is to decrease this problem to tolerable levels, so concepts and terms “can be used with reasonable clarity and precision to express, describe, analyse, compare, generalise about, explain, or evaluate subject matters of our discipline across various kinds of boundary”.^{54,55} The conceptualisation achieved in these first few chapters will be conventionally utilised during the whole thesis and therefore the reader will always be conscious about what this discourse is dealing with.

(iii) Conceptualism and Comparative Law Working Together

To attain its final objectives, apart from conceptualism⁵⁶, this thesis uses a second instrument: comparative law.^{57,58,59,60} While remaining conscious that the

⁵³ After all, as Summers says (2000, p. 216), “H. L. A. Hart and others have described one traditional task of legal theory as that of providing adequate concepts for the representation of general features characteristics of law in modern systems”.

⁵⁴ See Twining (2005, pp. 8-9).

⁵⁵ It would not be useful to describe all the “techniques of conceptual elucidation”, but Twining (2005, p. 13) mentions some devices that are available and can be used here, such as: “i. Awareness of certain cardinal features of language that pose threats to understanding (e.g. vagueness, types of ambiguity) (Hart, 1958, pp. 144–148). ii. Awareness of common false assumptions about language (e.g. the proper meaning fallacy hypostatisation) (Hart, 1958). iii. Techniques of division and classification. iv. Differentiating species of definitions; stipulative definitions (Robinson, 1950). v. Elucidation of concepts too abstract to be susceptible of definition per genus *et differentiam* (paraphrasis and phraseoplerosis) (Hart, 1953). vi. Disambiguation. vii. Use of standard or paradigm cases and variants. viii. Use of ideal types. ix. Sophisticated use of analogies, models and metaphors; (Black, 1962; Haack, 1998, Ch. 4). x. Wittgenstein’s family resemblances (‘game’) (Wittgenstein 1953, para 66; 1969, p. 17; Twining and Miers 1999, pp. 194–196, 398–399). xi. Deconstruction and immanent critique (e.g. Balkin, 1987, Binder and Weisberg, 2000, Ch. 5). xii. Distinguishing between analytic (etic) and folk (emic) concepts and uses of concepts”.

⁵⁶ Here, conceptualism means a tool to achieve a systematised panorama of the theory of precedent.

⁵⁷ The role of comparative law in jurisprudence is a matter for serious debates. In fact, comparative

doctrine of *stare decisis*⁶¹ has peculiarities in each of the countries in which it has been adopted⁶², once the conceptual systematisation of theory of precedent is achieved, it is possible to go deeper and present a comparative taxonomy of the Brazilian binding precedents.⁶³

This thesis supports Grossfeld's opinion when he states that "comparative law is not in competition with conceptualism but in partnership with it", and "a conceptual framework is useful, for it often makes it easier for the comparatist to find the right question to ask".⁶⁴ We have the belief that, nowadays, the boundaries of comparative law have been drawn so widely that they should necessarily work together with an area traditionally occupied by linguistics and conceptualism.⁶⁵

As a method of study⁶⁶, Comparative law has a lot to offer in this intellectual adventure.⁶⁷ Only through comparative law the fundamental questions of this thesis

law has various purposes: (a) it can be an academic discipline for general education or pedagogical purposes; (b) it can be a means of understanding legal rules in general; (c) it can be an aid to obtain a better understanding of one's respective national legal system, working in *lege lata* (useful, for instance, when courts have to interpret or apply internal rules); (d) it can be an aid to legislation and reform, working in *lege ferenda*; (e) it can be a contribution to the systematic unification and harmonisation of a field of law or even of an entire system. See De Cruz (1993, p. 15) and Bogdan (1994, pp. 27-39).

⁵⁸ See also David, René. *Les grands systèmes de droit contemporains* (7th ed, Paris, Dalloz, 1978), p. 6.

⁵⁹ Certainly, one could ask how conceptualism and comparative law can work together, if comparative law studies and compares foreign legal systems that are, by nature, different. Grossfeld, for instance, mentions Zweigert's view that comparative law is anti-conceptual by its very nature. See Zweigert's view *apud* Grossefeld (1990, pp. 10-11): "Working in comparative law gives one new grounds for scepticism about conceptualism in law. The dogmatic and functional are two different methods of thinking about law, or rather different stages in the development of legal science. And one may ask how legal concepts and doctrine can possibly assist functional jurisprudence".

⁶⁰ This thesis is based on a point of view completely different from Zweigert's opinion.

⁶¹ As is known, *stare decisis* – the full term is *stare decisis et quieta non movere*, meaning stand by decisions and do not move that which is still – is a Latin legal term, denoting the idea that, in a case-law system, prior court decisions must be followed as binding precedents.

⁶² For instance, there are many differences in the way the doctrine of *stare decises* is applied in England if compared with its application in the United States of America.

⁶³ See Grossefeld (1990, p. 10): "Conceptualism renders the legal system perspicuous and intelligible (as the rule of law requires), and meets our need for precise language and sharp ideation. Its disciplinary effect upon lawyers is a further advantage. It is true that "it is harder to break a framework of systematic thought than to range freely in the open, but the effort generates new strength".

⁶⁴ Grossefeld (1990, p. 12).

⁶⁵ See Watson (1974, p. 09).

⁶⁶ Or, as Zweigert and Kötz say, "an intellectual activity with law as its object and comparison as its process". Zweigert, Konrad and Kötz, Hein. *Introduction to Comparative Law* (3rd ed, Oxford, Clarendon Press, 1998), p. 2.

⁶⁷ As Hall had already said in the middle of the last century: "Thus, the world-wide social and political

can be answered, particularly because the lines to answer these questions are not completely clear. It will be the free tool to provide coherence for the investigation of English and Brazilian systems of precedent. For instance, comparative law will allow us, studying the national models of precedent, to discover the patterns of internal consistency, harmony and efficiency of these models and of the Western panorama as a whole. It will show us what categories of English and Brazilian law can be properly compared and how can this task be carried out. Comparative law certainly will help us to highlight the essentials in the national legal systems and present us with the strengths and the weaknesses of these systems.⁶⁸ It will present the solutions that these systems offer for a given legal problem and how and where one can use the results in other national legal systems. It will not be in competition with internal traditions but in partnership with it. Comparative law will, in fact, exercise a control function and allow us to reach a judgement which will be more balanced, thanks to a broader perspective. Furthermore it will lead to a more critical assessment, thanks to a multicultural understanding of the theory of precedents.

It is important to make clear that the comparison in this thesis will be both conceptual (focusing on concepts and terms) and functional (focusing on the possible solutions to the legal problems through the experience of each model that is analysed).

The comparison will be multilateral and cross-cultural, between English and Brazilian models mainly (eventually with the American and French models, as important samples of common law and civil traditions, respectively). It will also be an integrative and contrastive comparison, focusing on the similarities and differences between both models of precedents.⁶⁹ The comparison will be horizontal and vertical, because it will compare the current precedent models of these countries, but it will also have, to some extent, some incursions on the historical panorama.

Although this thesis has as background a comparison between legal systems in their entirety or between entire families of legal systems (called macro-comparison), it will be, truly, a micro-comparison, between models of precedents and

changes and the attendant 'mingling of cultures' which mark this century have greatly accelerated interest in comparative study". Hall, Jerome. *Comparative Law and Social Theory* (Binghamton/NY, Louisiana State University Press, 1963), p. 3.

⁶⁸ See Grossefeld (1990, p. 11).

⁶⁹ See De Cruz (1993, p. 5).

legal categories from specific countries.^{70,71} Furthermore, it will not be a comparison of substantive law, but a procedural comparison, meaning a comparison between the procedural characteristics of the models, precisely the way that these national systems deal with judicial precedents.

In order to compare the national models, the thesis works in four different ways: (i) describing the categories of the models concerned (mainly, the Brazilian and the English); (ii) highlighting the differences and similarities between the compared models; (iii) reflecting and criticising the resemblances and dissimilarities between systems and concepts⁷², as well as the respective standards of functionality; (iv) discussing the alternatives and presenting suggestions for the best regulation of the matter.

In summary, working together to systematise part of the pre-existent knowledge concerning the theory of precedents, conceptualism and comparative law have a very important practical value, as tools to present to researchers and those actively concerned with law reform, as final findings, a clear understanding of the factors which are important to positive innovation in Western precedent models.⁷³

After all, “if the theoretical results are accurate, they can be applied to any legal systems indistinctly”. In fact, as Zucca points out:

To what extent that is possible depends in turn on the accuracy of the accompanying comparative analyses. Whilst I do not believe that we can ever depict a global empire in which the law rules independently from its context, I believe in the possibility of enriching one’s own understanding of different domestic experiences by comparing them and drawing out common patterns and differences. For this reason, comparison sharpens understanding: it points to the role of contingencies and local practices in shaping legal concepts.⁷⁴

⁷⁰ See De Cruz (1993, p. 37): “The terms *macro-comparison* and *micro-comparison*, generally attributed to Rheinstein, are frequently used to describe the two different species of comparative study that may be undertaken. Macro-comparison refers to the study of *two or more entire legal systems*; micro-comparison refers to the study of *topics or aspects of two or more legal systems*. Among the topics chosen for micro-comparison may be: (i) the institutions or concepts peculiar to the systems; (ii) the sources of law, judicial systems and the judiciary, legal profession or even the structure of the legal system; (iii) the various branches of national or domestic law; (iv) the historical development of legal systems; and (v) the ideological, socio-legal and economic bases of that system. The *purpose of the comparison* will often determine the suitability of selection”.

⁷¹ See also Bogdan (1994, pp. 57-58) and Twining, William. *Comparative Law and Legal Theory: the Country and Western Tradition*. In Edge, Ian (ed). *Comparative Law in Global Perspective* (Ardsey/NY, Transnational Publishers Inc., 2000a), pp. 31-35.

⁷² See De Cruz (1993, p. 38).

⁷³ See Watson (1974, p. 16).

⁷⁴ Zucca, Lorenzo. *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the*

Evidently, this thesis will not propose the mere adoption of foreign models, which supporters of certain systems may do. The transplant of foreign rules, without previous discussion and adaptations, invariably leads to unsuitable solution to the traditions and reality of the recipient country. However, the judicial systems of any Western country essentially face the same basic problems, which they normally try to solve through similar means of justice (though sometimes with different results). Countries of both traditions may consider jointly some measures to improve their models of precedents and better deal with these problems.

(iv) Concerning the Legal Resources

The literature reviewed in this thesis will be integrated throughout the whole work as and when the need for analyses appears. The review aims to provide the reader with a background of the topic and to present this work as a link in the chain of research that has developed the field of knowledge in the theory of precedent.

Traditional legal method has been used in conducting the research for this study. However, this thesis aims to measure and present the real importance of precedents in both common and civil law traditions and, consequently, specialised material from both common law and civil law countries is used – mainly in English and Portuguese, but also in Spanish and French. Both classical and modern sources, concerned with conceptualism, jurisprudence, comparative law, legal systems, constitutional law, procedural law and theory of precedent are used. This includes statutes, case-law (law reports), commentaries, books, legal journals, reports, data-bases and available on-line tools, among other resources.

The resources have been used in many ways. Firstly, for instance, they have been utilised to explore the real impact that globalisation events have had in the development of contemporary theory of precedents. Secondly, they have been employed to demonstrate the traditional approach to the issue of precedents in Brazil. Thirdly, they demonstrate how the developments that have taken place in recent times have already shifted the thinking about precedents in Brazil. Fourthly, they have been used to comparatively present (in relation to England) the Brazilian current approach to

USA (Oxford, Oxford University Press, 2007, in paperback 2008), pp. 13-14.

precedents, highlighting its principal and strong aspects. Finally, these resources have also been used to support the findings achieved in this thesis in a way that they can be valuable to both civil and common worlds.

1.3 The Structure of the Thesis

This thesis will deal with both theoretical and practical aspects of the theory of precedent in Brazil and, in order to fulfil the original purposes of the research, it consists of one introductory chapter (Chapter 1), a further four chapters as well as a final chapter for the conclusions (Chapter 6).⁷⁵

The four core chapters that follow this introduction are divided into two main blocks. From a general point of view, Chapter 2 and Chapter 3 focus on the theoretical aspects and the practical uses of precedents in Brazil still under a traditional civil law perspective and then compare them with the English model. They also aim to establish the conceptual basis for development of the thesis. The second part (Chapter 4 and Chapter 5) aims to present a taxonomy of the Brazilian binding precedents and a detailed analysis of most of them. Chapter 5 is specifically dedicated to the new Brazilian Federal Supreme Court's Binding *Súmula*.

More specifically, the aim of Chapter 2 is to discuss and compare the role of precedents in the development of the law in Brazil and England. It will systematise the concepts of declarativeness, creativeness, persuasiveness and bindingness of precedents (mainly in Brazil), including establishing a consistent vocabulary for the categories related to these important and controversial issues of the theory of precedents, which can then be understood by both Brazilian and English audiences. This Chapter is very important from a practical point of view because it creates a unique reference to be applied in the comparative study of both national models of precedents throughout the thesis.

Chapter 3 analyses, still under a civil law perspective, how precedents work in Brazil and then compares it to the English model. The issues that will be dealt with in this chapter include the way Brazilian judges evaluate old and new precedents; how Brazilian judges discriminate – if they do so – *ratio decidendi* and *obiter dicta*; how

⁷⁵ Two appendices have also been attached to this thesis: Appendix I – The Brazilian Judicial System: an Overview; and Appendix II – List of the Statements of the Federal Supreme Court Binding *Súmula*.

they deal with seemingly relevant precedents; why Brazilian judges so frequently depart from precedents; how they deal with the issue of prospective overruling; and how precedents are reported in Brazil. Conceptual diversities arise in the way the Brazilian and English legal systems deal with precedents and the purpose is also to explain and minimise the impact of such diversities in the understanding of this thesis.

As the last few decades in Brazil have seen a clear increase in the use of precedents in terms of frequency, creativity and bindingness, Chapter 4 aims to present a comprehensive taxonomy of the several Brazilian categories of binding precedents that are expected to progressively transform the Brazilian legal system into an example of a mixed system. This chapter will explain the main aspects and the binding character of the following categories of Brazilian precedents: (i) the Portuguese *Assentos*, (ii) the *Prejulgados* in Labour Courts, (iii) the Labour Courts “normative sentence”, (iv) the *Prejulgados* in Electoral Courts, (v) the normative power of the Electoral Courts, (vi) the general incident of standardisation of case law of the Code of Civil Procedure, (vii) the special incident of standardisation of case law of the Federal Small Claims Courts, (viii) the binding decisions in case of multiplicity of special appeals (that are appeals to the Superior Court of Justice) based upon a similar question of law, (ix) the incident to declare the unconstitutionality of a normative act in the context of the decentralised (“*difuso*”) judicial review of legislation, (x) the binding decisions concerning the general repercussion (“*repercussão geral*”) in the extraordinary appeals (that are appeals to the Supreme Court) and (xi) the binding decisions on the centralised (“*concentrado*”) judicial review of legislation in Brazil.⁷⁶

Chapter 5 focuses on the new and very important Federal Supreme Court Binding *Súmula* (introduced into Brazilian law by Amendment 45 to the Federal Constitution, passed in 2004), analysing its origins, features and significance under a dual perspective that could be interesting and useful for both common and civil law traditions. According to the new article 103-A of the Brazilian Constitution, the Supreme Court is allowed to issue a Binding *Súmula* that represents, by means of several statements, its consolidated case law. As will be seen, as a result of similar

⁷⁶ As will be fully seen in Chapter 4, these Brazilian binding precedents are not judicial precedents in the *stricto sense* (as applied in the Anglo-American *stare decisis* doctrine). They are results of diverse types of procedure, but each of them, in its own way, has a binding effect.

understandings in numerous concrete cases, the incorporation of a statement in Binding *Súmula* of the Supreme Court is the climax of the Brazilian decentralised (“*difuso*”) judicial review of legislation, the last stage of a long journey, which usually reaches the Supreme Court via an extraordinary appeal. All other courts and the public Administration are hence obliged to follow these statements of the Supreme Court *Súmula*.

The last chapter (Chapter 6) – after the previous chapters to have given a complete account of how precedents are understood and how they operate in Brazil – will provide the conclusions of the research in terms of efficiency of the new Brazilian model of precedents. It focuses on some of the advantages of the doctrine of *stare decisis* – stability, certainty of law, equality, time-saving –, as positive criteria of functionality, in order to analyse some improvements in the deliverance of justice in Brazil since the adoption of a more comprehensive approach to binding precedents. The analysis will be illustrated with data and figures from Brazilian official databases and reports. This methodology is well balanced to avoid the overusing of either pure conceptual elements or strict empirical knowledge. Taking the English model as a paradigm, it finally comparatively presents and debates some strengths of the new Brazilian approach to precedents: greater simplicity of the Brazilian new model of Binding *Súmula* if compared with the common law doctrine of *stare decisis*; the good access to precedents in the Brazilian legal system; and the balance between statutes and precedents as established by the model of Binding *Súmula*, emphasising that the Brazilian mix of civil and common law elements has proved a very synergic model.

2 The Judicial Law-Making in Brazil

2.1 General Considerations

The purpose of this chapter is to discuss and compare the role of precedents⁷⁷ in the development of the law in Brazil and England. Taking a comparative perspective between these two countries, it will systematise the concepts (and establish a consistent vocabulary) for the categories of creativeness, declarativeness, persuasiveness and bindingness of precedents, which can then be understood by both Brazilian and English audiences, in order to compare this very special area of the law.

The following are some issues that this chapter intends to discuss when contrasting Brazilian law with English law: (i) The impact historical heritage, legal theory and recent legislative provision had on the approach to precedents in Brazil. (ii) To what extent precedents are sources of law in Brazil; are they creative or merely declarative sources? (iii) How is the issue of creative precedents and the violation of the principle of the separation of powers addressed in Brazil? (iv) To what degree are precedents persuasive or binding in Brazil? Are there any degrees of persuasiveness and bindingness? (v) How is the issue of binding precedents dealt with in relation to the violation of the “principle of the rational persuasion of the judge”?⁷⁸ (vi) How is the Brazilian Federal Supreme Court changing its approach with regards to the mere persuasiveness of its decisions in the decentralised judicial review of legislation?

⁷⁷ In this chapter the term “precedent” is generally used in a narrow or strict sense, that is, to mean a single prior judicial decision dealing with some legal issue and possibly relevant to a case to be decided. In other words, a precedent means a single decision that is taken as somehow related or possibly influencing the decision of the following case. This thesis, mainly in chapters 4 and 5, will also refer to precedents in a broader or *lato sensu* to encapsulate Brazilian particular binding precedents that are not precedents in the *stricto sensu* (as applied in the Anglo-American *stare decisis* doctrine). They are results of diverse types of procedure (as in the example of the new Supreme Court Binding *Súmula*), each of them, in its own way, having binding character. The aim of this footnote is to distinguish the meaning and the uses of the term “precedent” in its strict and broad senses.

⁷⁸ In Brazil, the principle of the “rational persuasion of the judge” is also known as the principle of “free motivated convincing”. According to article 131 of the Civil Procedure Code (Law 5869/1973), judges shall analyse the arguments of the litigants and the evidence of the case and freely build up their decisions. However, they must state the reasons that lead them to the decision, as all the decisions of the Judicial Power, according to article 93, IX, of the Federal Constitution, shall be justified.

In order to answer these questions, the history of Brazilian law needs to be revisited. The views of some schools of jurisprudence on the role of precedents in the formulation of the law, as they are adopted in Brazil, will be outlined in this chapter, highlighting the problems arising from a later discovery of the common law jurisprudence. Furthermore, this chapter revisits the debates (taking place in Brazil) on the role of precedents being creative or merely declarative. It focuses on the issue of creative precedents and the alleged breach of the principle of the separation of powers, presents a critical opinion on the debate and, finally, systematises the issue of creativeness and declarativeness of precedents in Brazil. This Chapter also analyses the question of persuasiveness and bindingness of precedents in Brazil. It starts by giving general information on the topic and then moves onto the concepts of persuasive precedents (highlighting the factors that can influence the degrees of persuasiveness) and binding precedents in Brazil. Thus, it moves into the debate (taking place in Brazil) on the violation of the principle of the rational persuasion of the judge by the adoption of a rule of binding precedents. Finally, it carefully analyses the Brazilian Federal Supreme Court recent case law concerning the mere persuasiveness of its decisions in the decentralised judicial review of legislation, in order to present how the Court is changing its approach with regards to this major issue.

The systematisation of concepts and the establishment of a consistent vocabulary for the theory of precedents proposed in this chapter will also be very important from a practical point of view, because they will create a unique reference to be applied in the comparative study of both national systems of precedent throughout the thesis. This will allow the reader to always be aware of what the thesis is dealing with and accurately evaluate its content, which cross the boundaries between Brazilian and English law.

2.2 The Influence of Continental Europe on Brazil's Legal History

Like in most countries in the Western world, the status accorded to Brazilian precedents may be viewed as the final result of an assemblage of historical heritage, jurisprudence and recent legislative provision.

The historical origin of the “*República Federativa do Brasil*” is in the establishment of a colony in the so-called new world by the Portuguese in the

beginning of the 16th century.⁷⁹ Around three centuries later, in 1815, Brazil was promoted from colony to a sovereign kingdom that was united with Portugal.⁸⁰ Following this, on 7 September 1822, the eldest son of the Portuguese King João VI and Regent of Brazil, Prince Pedro, declared the country's independence from Portugal. Prince Pedro was declared and crowned (in October and December 1822, respectively) the first ruler of independent Brazil, as Emperor Dom Pedro I.⁸¹ It was during this “first Empire”, on 25 March 1824, that the first Brazilian constitution was promulgated. Pedro I abdicated on 7 April 1831⁸², leaving behind his oldest son, who was to become the Emperor Dom Pedro II.^{83,84}

At the beginning of Brazil, the old norms imported from Portugal provided satisfactory solutions to most of the legal issues of the new country. For instance, the “*Ordenações Afonsinas*” (1492) and the “*Ordenações Manuelinas*” (1512) as well as the (Spanish) “*Ordenações Filipinas*” (1603)⁸⁵ were applied for several years in Brazil.⁸⁶ Interestingly, in the country’s legal history, the making of binding precedents was first registered – as early as the 19th century, during the rule of the 1st Emperor of Brazil (D. Pedro I) – with the incorporation of the old Portuguese *Assentos*⁸⁷ into Brazilian law. Indeed, as Brazil still could not count on its own case law, the existing

⁷⁹ Similar to what happened in North America with the foundation of colonies by the English in the beginning of the 17th century. See Séroussi, Roland. *Introducción al derecho inglés y norteamericano* (Tradução de: Introduction aux droits anglais et américain, Enrique Alcaraz Varó tr, Barcelona, Ariel, 1998), p. 81. See also Ráo, Vicente. *O direito e a vida dos direitos*, vol 1 (3rd ed, São Paulo, RT, 1991), p. 106.

⁸⁰ Previously, in 1808, fleeing the troops of the French Emperor Napoleon Bonaparte, the Portuguese Royal Family had already established themselves in Brazil, transforming the capital, Rio de Janeiro, into the capital *de facto* of the Portuguese Empire.

⁸¹ In 1821, King João VI had returned to Portugal and the Portuguese government attempted to turn Brazil once again into a colony, setting aside the new achievements that had been incorporated since 1808. However, Prince Pedro took the side of the Brazilians.

⁸² He went to Europe to fight a civil war for the throne of Portugal.

⁸³ During the period of the minority of Dom Pedro II, the Brazilian Empire was lead by successive Regents.

⁸⁴ Throughout that time, most Brazilians were in favour of the monarchy. Republicanism did not have great support and the monarchy was only overthrown on 15 November 1889. Even so, Pedro II was at the height of his popularity among his subjects. Actually, the abolition of slavery on 13 May 1888 by the “Lei Áurea”, sanctioned by Princess Isabel (the Emperor’s daughter, who was in charge while the Emperor was in Europe), which displeased part of the country’s elites, is more likely to be the real factor for the overthrow. Besides, the first Republican governments were basically military dictatorships.

⁸⁵ See the time of the Iberian union under the crown of the Kings of Spain (1580-1640).

⁸⁶ See Souza, Marcelo Alves Dias de. *Ensaio ingleses* (Mossoró, Queima-Bucha, 2011), pp. 57-59.

⁸⁷ This issue, the *Assentos*, will to be developed in Chapter 4.

Assentos, produced in Portugal, were naturally accepted into the still developing Brazilian legal system. This regime of the Portuguese-Brazilian *Assentos* would last until that the monarchy was overthrown, when, due to the ideology brought with the proclamation of the Republic, the country attempted to definitively break the ties with Portugal.⁸⁸

Eventually, in form and substance, Brazilian law was progressively adapted to the specific conditions of the country. Firstly, apart from the Portuguese civil law, a rudimentary law was developed in Brazil during the period of the first Empire. The first Brazilian codifications appeared such as the Criminal Code of 1830 and the Code of Criminal Procedure of 1832 (the first Civil Code only appeared in 1916), which helped the justice administration. Secondly, besides the influence of Iberian law (from Portugal and also Spain), the development of the Brazilian law was strongly influenced by the law produced in Continental European countries such as France, Germany and Italy, which also explains the Brazilian association with civil law.

Due to this background, Brazilian law is historically linked to the Roman-Germanic tradition, and civil law concepts prevail over common law practice. Several branches of Brazilian law are codified, although non-codified statutes also play a substantial role in the framework of the legal system. Doctrinal works have strong influence upon legislative development and judicial decisions. Judicial precedents are generally only persuasive. Currently, the entire legal system is covered by the Federal Constitution of 1988 (promulgated on 5 October 1988), the fundamental law of Brazil. Up until April 2012, there have been 76 amendments to the Federal Constitution. According to the principle of the sovereign of the Constitution, all other legislation and judicial decisions must conform to its provisions. This includes the state's constitutions and "organic laws" of the Municipalities and the Federal District, which also must not contradict the Federal Constitution.

⁸⁸ It was only in 1850, with the advent of the Regalement 737, that the Brazilian legal system had a specific legislation regulating the structure of the Judiciary and the civil procedure. However, this legislation said nothing about the dynamics and value of the case law of the Brazilian courts in order to fulfil any gaps in the law and to prevent divergence in cases regarded as similar.

2.3 Recent Common Law Influxes

If the Brazilian law ended up choosing an association with the civil law (and statutes are the first formal source for the application of the law), it has not been immune to the influence of common law. Actually, over the past 20 or 30 years, starting with the adoption and development of the class action, the Brazilian lawgiver has progressively turned to common law countries in order to borrow ideas for the improvement of its legislation, especially in areas such as procedural law.⁸⁹ In contemporaneous Brazil, due to globalisation, the absorption of these common law practices – including a wider use of binding precedents – has visibly intensified.

During recent years, precedents have become a much debated subject⁹⁰, even though, in some cases, without much academic depth. At the beginning, the debate among Brazilian scholars has mainly focused on the convenience or not of the adoption of the Binding *Súmula*^{91,92}, and less on the grounds and *modus operandi* of a true Brazilian theory of *stare decisis*. When the debate was initiated, there were many voices that arose – albeit for different reasons, which mainly included supposed violations to principles of the separation of power and of the rational persuasion of the judge – against the adoption of the Binding *Súmula* or any attempt to implant a Brazilian theory of *stare decisis*.⁹³ A great part of these opinions

⁸⁹ As Markesinis and Fedtke state “legal transplants continue to be extremely important in practice. Alan Walton observed in 1974 that borrowing is ‘the most common form of legal change’, and this is true for constitutional ideas today as it has been for private and commercial law in the past”. See Markesinis, Basil and Fedtke, Jörg. *Engaging with Foreign Law* (Oxford and Portland/OR, Hart Publishing, 2009), p. 129.

⁹⁰ Scholars in Brazil, such as Dinamarco, have recognised that the Brazilian civil procedural science has experienced, at present more than ever, a great need for noticing the surrounding realities represented by the elements and concepts of the procedural system of other countries in the search for appropriate solutions to the problems of its justice. See Dinamarco, Cândido Rangel. *Fundamentos do processo civil moderno* (5th ed, São Paulo, Malheiros, 2002), p. 762.

⁹¹ See lists of arguments in favor and against in Schäfer, Gilberto. *Súmulas vinculantes: análise crítica da experiência do Supremo Tribunal Federal* (Porto Alegre, Livraria do Advogado Editora, 2012), pp. 32-35.

⁹² It should be reminded that, as will be seen in more depth later, the Binding *Súmula* (or a statement of this *Súmula*) is something different from the judicial precedent as it is defined under the theory of *stare decisis*.

⁹³ Nobre Júnior lists the following names whom were of this opinion: Evandro Lins e Silva, José Celso de Mello Filho, Carmen Lúcia Antunes Rocha, Luiz Flávio Gomes, Valmir Pontes Filho, Dalmo de Abreu Dallari, Pestana de Aguiar, Dínio de Santis Garcia, Vicente de Paula Maciel Júnior and Mauro Roberto Gomes de Mattos. According to the same author, those who were in favor of the adoption of the Binding *Súmula* were also of considerable number and included: Miguel Reale, Carlos Mário da Silva Velloso, Sálvio de Figueiredo Teixeira, José Augusto Delgado, Walter Nunes da Silva Júnior, Carreira Alvim, Calmon de Passos, Edgard Silveira Bueno Filho, Diogo de Figueiredo Moreira Neto,

was affected by a lack of knowledge about what a doctrine of *stare decisis* truly is. Furthermore, there was also the question of prejudice – against foreign models – to be taken into account.

The doctrinal prejudice against foreign law – in this case, that from common law origin – has not been, by any means, reflected in the law reform process delivered by the Brazilian Parliament during recent years.⁹⁴ However, the Brazilian legislator tends to rely on what academics suggest about the transplant of foreign law and, following the opinion of the experts, the simple adoption of the theory of *stare decisis* in a pure common law way is not on the agenda in Brazil. It is really common sense that a simple transplant of a foreign model, preached by enthusiasts of any legal system, would not be suitable for Brazil (as for this comparative study it would not be useful to just transplant the concepts of the theory of *stare decisis*, as they are applied in England, to explain Brazilian law).⁹⁵ Concerning the way of dealing with precedents, Brazilian lawgivers and academics have attempted to borrow some concepts and what are considered successful practices in the common law tradition. Nevertheless, based upon this knowledge, they have attempted to develop a doctrine of binding precedents in which the concepts, terms and *modus operandi* do not affront the Brazilian historical, philosophical and legal backgrounds.

Many mechanisms that reach vertical and horizontal uniformity in judicial decisions, based on binding precedents, have been introduced in Brazilian law, which will, at least most of them, be discussed in Chapter 4. Finally, the Federal Supreme Court Binding *Súmula* (which will be discussed in Chapter 5) – as created by Constitutional Amendment 45/2004, where the case law of the court is crystallised into several statements that are to bind all other courts and the Executive branch – is the climax of this progress towards an original mixed approach to precedents. This newly created binding precedent, it is important to note, is just another step in a legal system that has led to the construction of a special model of binding precedents,

Fernando da Costa Tourinho Neto, Ivan Lira de Carvalho and Saulo Ramos. See Nobre Júnior, Edilson Pereira. O direito processual brasileiro e o efeito vinculante das decisões dos tribunais superiores. *Revista de Informação Legislativa*, v. 37, n. 148, out./dez. 2000a, pp. 154-155.

⁹⁴ This openness to the use of foreign sources in the course of legislation can be explained by the tendency of the Brazilian legislator to mould the law according to the prevailing political thought of the time. According to Markesinis and Fedtke (2009, p. 177), the same has happened in Germany over the last 100 years.

⁹⁵ See Wambier (2012, p. 86).

despite the historical Brazilian adoption of statutory and codified law such as in Continental Europe.

The last decades in Brazil have also seen a natural increase in the use of precedents in terms of frequency and creativity. Precedents are currently used as one of the main grounds of every judicial decision. Courts and judges' decisions rather infrequently refer only to the Constitution or the relevant statutes, and precedents are quoted even when the legal issue is "covered" by legislative provisions. In this case, the reference to precedents has been a sort of medium for the reference to the legislation and not as an alternative to it (the legislation). Indeed, statutory provisions are frequently addressed, analysed and interpreted by means of discussion of relevant precedents. These provisions gain persuasive force when they are embodied in one or several precedents.

From the historical point of view, this expansion of the use of precedents in Brazil started becoming mainly important, in terms of frequency and decisiveness, in some specific areas of the law. An important factor is whether a certain field of the law is comprehensively regulated by legislative provisions, because, where they are lacking – such as the cases of administrative and social security law, which are not codified in Brazil –, precedents play a more significant role. Besides, at present, significant importance can be perceived among the uses of precedents in constitutional, electoral and tax law, supposedly due to the fact that cases in these areas deal mainly with issues of law, while in others areas, such as criminal law, judges often devote greater attention to the issues of fact. This also leads to another difference that is noted in the use of precedents by Brazilian courts. Considering the different levels of the judicial structure, lower courts often devote their attention to the issues of fact. Consequently, the use of precedents, commonly limited to the decision of the issues of law, seems to be less decisive. On the other hand, since higher courts – especially, the Supreme Court and the Superior Courts – mainly deal with issues of law, precedents play a distinguished role in the rationale of their judgments.⁹⁶

⁹⁶ According to Taruffo and La Torre, this imbalance in the use of precedents between lower and higher courts is similar to Italy. Taruffo, Michele and La Torre, Massimo. *Precedent in Italy*. In MacCormick, Neil and Summers, Robert S. (eds). *Interpreting Precedents: a Comparative Study* (Aldershot/England, Ashgate/Dartmouth publishing, 1997), p. 153.

In spite of these imbalances, the outcome is that, in Brazilian judicial practice, precedents play a role that is currently more important than the role of the doctrine. Apart from the reference to the relevant constitutional or statutory provisions, they are the most important justificatory material used in judicial decisions. Indeed, if precedents traditionally have not been formally listed among the “sources of law” in Brazil, nowadays they are considered at least as *de facto* sources and, gradually, part of doctrine is moving toward the recognition of the case law as a formal source in the Brazilian legal system.⁹⁷

This panorama clearly serves to challenge the myth that affirms that the doctrine of binding precedents or *stare decisis* is an exclusive common law practice.⁹⁸ The bindingness of judicial decisions is a characteristic freely auto-attributed by any legal system in order to achieve, among other values, equality, certainty and speed in judicial decisions. In other words, the adoption of a rule of *stare decisis* by a legal system does not request its historical association with the common law tradition.

This new situation also serves to put aside a second myth that states that civil law judges, in terms of the creativity of their decisions, perform a completely different role if compared with their common law counterparts.⁹⁹ Similar to judges in common law countries, Brazilian judges also create law, and it can be proved by evidence that some areas in Brazilian law, which were not originally statute regulated, have been considerably developed by case law.

In summary, although historically associated with the civil law, Brazilian law, especially over recent years, has undergone qualitative changes, including the adoption of some successful common law practices, such as a wider use of precedents in courts. Currently, it has visibly intensified and, concerning the frequency and relevancy of the uses of statutes and precedents as the grounds to

⁹⁷ Basically, according to article 4º of Decree-Law 4657/42 (the statute that gives the guidelines to the interpretation and application of the law in Brazil), apart from statutes, customs and the general principles of law are the others formal sources of law in Brazil.

⁹⁸ See Silva, Lucas Cavalcanti da. Controle difuso de constitucionalidade e o respeito aos precedentes do Supremo Tribunal Federal. In Marinoni, Luiz Guilherme (coord). *A força dos precedentes: estudos dos cursos de mestrado e doutorado em direito processual civil da UFPR* (Salvador, JusPODIVM, 2010a), p. 173. See also Marinoni, Luiz Guilherme. *Precedentes obrigatórios* (São Paulo, RT, 2010b), p. 27.

⁹⁹ See Ataíde Júnior, Jaldemiro Rodrigues de. *Precedentes vinculantes e irretroatividade no sistema processual brasileiro: os precedentes dos tribunais superiores e sua eficácia temporal* (Curitiba, Juruá, 2012), p. 38.

judicial pronouncements, the Brazilian legal system is likely to become in the future an example of a mixed model.

2.4 A Later Discovery of the Common Law Jurisprudence

In parallel with its historical and legal background, the development of the Brazilian jurisprudence¹⁰⁰ has been based on ideas transplanted from Continental European countries and this approach has also influenced the role that has been attributed to precedents, as sources of law, in Brazilian law.

Historically, two opposite philosophical ideas dominated the debate in the philosophy of law during the 19th and 20th centuries in Brazil: the naturalist and the positivist conceptions of law.

In general, the ideas of natural law¹⁰¹, which have been developed in Brazil, affirm the existence of: (i) a kind of law that is based upon reason, upon the quality of individual or collective human beings, or even upon the relationship between human beings and God; (ii) a law which pre-exists the positive law, which is made by the human beings or the State. For Brazilian jusnaturalists, this natural and superior law has to be respected always. Positive law (and even the Brazilian Constitution), under which the Brazilian society lives, must be in harmony with the laws of nature and the natural rights of human beings.¹⁰² Beginning from this idea that there is a pre-

¹⁰⁰ It is important to remind readers that the term “jurisprudence” is used, in law, with at least four different meanings: a) as a synonym for philosophy or science of law; b) with the meaning of a series of uniform judicial decisions about the same judicial question; c) representing, in a less precise way, the group of judicial decisions of a country as a whole; and d) referring, improperly, to an isolated judicial decision. Here, the term *jurisprudence* means science or philosophy of law. Concerning this issue, see Santos, Evaristo Aragão. Em torno do conceito e da formação do precedente judicial. In Wambier, Teresa Arruda Alvim (coord). *Direito jurisprudencial* (São Paulo, RT, 2012), pp. 141-142.

¹⁰¹ According to Nader, the first thinker to expose a doctrine about the natural law was the Greek Heraclitus of Ephesus (approximately 535-470 BC), who professed a pantheist cosmological jusnaturalism. See Nader, Paulo. *Filosofia do direito* (4th ed, Rio de Janeiro, Forense, 1995), p. 155. Throughout history, naturalism has been represented, among others, by thinkers such as Aristotle, Cicero, Saint Augustine, Hugo Grotius, Saint Thomas Aquinas, Rousseau, John Locke, Del Vecchio; while in 20th century Anglo-American law, the names of Lon Fuller and Ronald Dworkin can be highlighted. However, this wide-ranging set of followers goes from effusive apostles, such as Saint Thomas Aquinas, who developed a classification of rights based upon the relationship between human beings and the Creator, to more moderate defenders, such as Fuller (in its *Morality of Law*, 1969), who only state that there are pre-existing principles to “positive law” and that they have to be considered in any judicial system. See Cooper, Phillip J. *Public Law and Public Administration* (3rd ed, Atasca, F. E. Peacock Publishers, 2000), p. 57.

¹⁰² Similar to the United States of America, where, for the jusnaturalists, positive law (the American Constitution included) must be in harmony with the laws of nature and natural rights of humans beings. In fact, Cooper (2000, pp. 56-57) states: “Natural law jurisprudence has been of major

existent law to the law that is made by the State, usually referred to as positive law, the supporters of natural law, in this most “purist” form, do not give to precedents the status of law maker. For them, the role of precedents, rather than creating law, is to reveal the law, which means to discover (from principles of natural law and reason) and declare the law that already exists, for this is just the result of simple reasoning: “the law as it ought to be” (the judicial decision making) must reflect “the law as it is” (the pre-existent natural law).¹⁰³

Legal Positivism¹⁰⁴ in Brazil opposes the idea of a natural law. While the supporters of Jusnaturalism in Brazil occupy themselves with the basis and the legitimisation of the positive law, founding its validity upon the respect of principles and absolute values, the positivists are interested mainly in ascertaining the formal logic tenets of its validity.¹⁰⁵ The law is positive, which means that it is man’s making, and they insist that what is important is to have a system or “logic” of positive law.^{106,107,108}

importance to Western law in general and to American Law in particular. (...). Particularly in its more modern manifestations, the theory suggest that while mankind’s relationship to the world is a matter of natural order, their relationships with their fellows are in large part a matter of social contract. Our ability to live together under such a social contract stems from the fact that people are both rational and social beings who, under the right conditions, can govern themselves. But social contracts, under which the society operates, such as the U.S. Constitution, must be in harmony with the law of nature and the natural rights of all citizens”.

¹⁰³ The meaning of the expressions “the law as it ought to be” and “the law as it is” here does not have any connection with the meaning such expressions may have in logic (legal or not). They are used here only to illustrate the fact that, for the *jusnaturalists*, the “law” that is made by the State or by men, which is subsequent, must reflect the pre-existent natural “law”.

¹⁰⁴ As for Legal Positivism, it should be understood the assemblage of the several manifestations of this kind of thought and not any of the several specific tendencies, that is, Normativism, the Exegetical School, Analytical Jurisprudence, Decisionism and their principal scholars, such as Thomas Hobbes, John Austin, Hans Kelsen and H. L. A. Hart, among many others.

¹⁰⁵ Kelsen, a normativist tendency bulwark very much studied in Brazil, for instance, exalts the formal validity of the norm, making it the centre of all of his conception of law. See Kelsen, Hans. *Pure Theory of Law* (Gloucester/MA, Peter Smith, 1989).

¹⁰⁶ It is possible, based on Nader and Hart, to catalogue the main positivist ideas from a comparative Brazilian and English approach. They are: (i) Identification of the law with mandates; (ii) There is no essential nexus between the spheres of morals and law; (iii) The study of the judicial concepts must be “watertight” to sociological, ethical and teleological reflection; (iv) Given the logical character of the judicial system, judicial decision making must be inferred independently of the support of other elements, such as ethics and politics; and (v) Moral judgments cannot be emitted or supported as related to facts. See Nader (1995, p. 175) that cites Hart.

¹⁰⁷ It was based on these ideas that in England Austin “launched his attempt to develop a fully articulated logical system of law. He began with the idea that law is the command of the sovereign backed by a sanction. The task is to develop from that premise a system that is logically coherent and consistent”. See Cooper (2000, p. 57). The importance of the English John Austin’s (1790-1859) analytical jurisprudence is justified by its content as well as the influence that it had upon his countrymen, such as Thomas Holland, William Markby and Sheldon Amos, and also in foreigners

Under the view of Positivism generally adopted in Brazil, the task of the judge is mainly to maintain the logical integrity of the legal system. In other words, the role of the judicial activity (or of judicial precedent) is to maintain the coherence of the existent statute law (including the Constitution). It serves, using a metaphor, as an amalgam to fill in undesirable gaps (for those who admit their existence) or simply to maintain the whole system in a more united form.

The problem is that legal positivism has been divided into several currents. If there is some relative consensus concerning the aims of the judicial activity, opinions among Brazilian positivists are considerably divided over the constitutive attributes of precedents: do they create or merely reveal the law? Some of the positivists, above all based on a strict view of the principle of separation of powers¹⁰⁹, deny precedents the attributes of creating law.¹¹⁰ But others, following Kelsen's opinion, assert that a judicial decision does not have, as it is often supposed, a simple declaratory character. The judge simply does not have to find out and to declare a law that is already firm and finished, whose making has already been completed. The function of the court is not a mere "finding" of the law or "juris-dictio" in this declaratory meaning. The "finding" of the law, through a reasoning decision, consists of the determination of the general and particular norm to be applied to a concrete case. This determination does not simply have a declaratory nature, but a constitutive one as well. The important element of decisionism in the activity of the judge – though the judge is bound by statute law – clearly approaches Kelsen's view to legal realism and the English legal positivism in general. They all believe that the law is a human creation and that the individual norms that decide concrete cases are created by judges.^{111,112,113}

such as George Paton in Australia and Sir John Salmond in New Zealand. In Brazil, concerning this question, see Nader (1995, p. 181).

¹⁰⁸ Kelsen, beginning with what he called "basic norm" as the basic principle, in his *"Pure Theory of Law"*, also successfully forwarded in the same direction.

¹⁰⁹ This argument will be fully developed later in this Chapter.

¹¹⁰ An example is the well-known but nowadays outdated School of Exegesis. It emerged from the Napoleonic Code and its principal defenders included Demolombe, Bugnet, Aubry, among others. For them, the Code represented, both formal and materially, the only source of law, which would be complete and perfect, and jurists should research the law only from the rules stated in it. They denied judges the liberty of invoking other sources in order to find solutions to concrete cases. Concerning the School of Exegesis, the French style of phrase unique and precedents, see Bustamante (2007. p. 33).

¹¹¹ See Kelsen (1989, pp. 237-238).

On the other hand, only recently (particularly in the last 20 years), Brazilian jurists are debating the ideas of the typical common law schools of thought, such as the American Sociological School of Jurisprudence and American Legal Realism.¹¹⁴

The view that the law is, or must be, the maximization of social needs and the minimization of social tensions and costs, as developed by the American School of Sociological Jurisprudence, that emerged in the 20th century (represented by jurists such as Roscoe Pound and Julius Stone, among others^{115,116}), for example, has been increasingly applied in Brazilian criminal courts. Beginning with the tenet that they must be engaged in this balance of interests – and denying the traditional view of a mere declaration of a fixed criminal law –, judges have weighed in their

¹¹² See Bustamante (2007. pp. 27, 100-101).

¹¹³ Apart from these two opposite conceptions of law (naturalism and positivism), the Historical School can also be mentioned as an example of philosophical thought that was, in the past, an object of debate by Brazilian scholars. Founded in Germany, the Historical School, as Serpa Lopes states, also emerges as an opposition to Jusnaturalism, because their supporters did not believe in the pre-existence of a complete and finished “law”, already “written in the firmament”. It is also, under a certain meaning, a reaction to the positivist view of an infallible system (usually codified). The representatives of the Historical School abandoned the dogma of the omnipotent lawmaker and moved their attention to the great elementary powers that act in the making of the law. Denying the idea of an eternal and universal law, as well as the omnipotence of the lawmaker, the Historical School asserts as typical of the judicial decisions to settle for the facts and circumstances of moment and place. They (the judicial institutions) are products from the customs and the history of a people. For the Anglo-American law, the construction of its common law is, in the meaning of law made through the times from the customs and the circumstances crystallised into the judicial precedents, a living example of the historical idea of law. The same can be said of Brazil: if the Brazilian judge must, when interpreting the statutes, adapt them and settle them for the needs of the time and the place, precedents have clear constitutive attributes and a fundamental role in the making of law. Globally, the Historical School has as its main representatives the Englishman Sir Henry Maine, and the German nationals, Gustav Hugo, Puchta and, probably the most well-known of all, Savigny. See Lopes, Miguel Maria de Serpa. *Curso de Direito Civil*, vol 1 (6th ed rev, Rio de Janeiro, Freitas Bastos, 1988), p. 19.

¹¹⁴ Similarly, the English legal realism of the end of the nineteenth century – also represented by the idea that judges make and modify the law (though more subtly than the American one) – has only received the attention of Brazilian jurists lately. See Bustamante (2007. p. 26).

¹¹⁵ To explain the function that the law has, they coined the expression “social engineering”, which is, in Walker’s words (1980, p. 1.151): “A metaphor employed by some sociological jurists, notably Roscoe Pound, to illustrate their contention that the function of law in society is to achieve a proper balance between freedom and control, encouragement and prohibition, and to enable persons to interact with one another in society with the minimum of heat and friction, waste of energy and to use their energies to the maximum possible effect”.

¹¹⁶ Pound summed up the thought of the School of Sociological Jurisprudence in this way: “1. They look more to the working of the law than to its abstract content. 2. They regard law as a social institution which may be improved by intelligent human effort, and hold it their duty to discover the best means of furthering and directing such effort. 3. They lay stress upon the social purposes which law subserves rather than upon sanction. 4. They urge that legal precepts are to be regarded more as guides to results which are socially just and less as inflexible molds. 5. Their philosophical views are diverse”. *Apud* Cooper (2000, p. 58), who cites the following work: Pound, Roscoe. The Scope and Purpose of Sociological Jurisprudence (1912) 25 *Harvard Law Review* – HLR, pp. 489-516.

decisions about the pros and cons of a criminal procedure when considering the low significance of the crime committed and have sometimes acquitted the defendant. With these heterodox decisions, they have contributed to the law-making role of precedents in Brazil. For instance, this view was recently applied by the Supreme Court on several occasions, as in: *Habeas Corpus* 107370/SP¹¹⁷, *Habeas Corpus* 105919/RS¹¹⁸, *Habeas Corpus* 104286/SP¹¹⁹ and *Habeas Corpus* 100937/RS.¹²⁰ It was also applied by the Superior Court of Justice many times, as in: *Habeas Corpus* 203806/SP¹²¹, *Habeas Corpus* 185372/SP¹²² and *Habeas Corpus* 108349/RS.¹²³

In the last few years, the Brazilian legal community has also focused on the ideas of the American Legal Realism, the thought developed, in different periods, by at least two groups of jurists¹²⁴, which consists, in general terms, of the adoption of an empirical method of scientific investigation in which (i) concrete reality is given prominence, (ii) the creation of law by judicial decisions is recognised, (iii) and a secondary role is attributed to the statutes.¹²⁵

¹¹⁷ *Habeas Corpus* – HC 107370/SP – STF – 2nd Panel – *Rapporteur* Justice Gilmar Mendes – j. 26-4-2011 – Dje 119 Div. 21-6-2011 Publ. 22-6-2011.

¹¹⁸ *Habeas Corpus* – HC 105919/RS – STF – 2nd Panel – Unanimous – *Rapporteur* Justice Ayres Britto – j. 23-11-2010 – Dje 020 Div. 31-1-2011 Publ. 1-2-2011 – Ementário Vol. 02454-3 p. 762.

¹¹⁹ *Habeas Corpus* – HC 104286/SP – STF – 2nd Panel – Unanimous – *Rapporteur* Justice Gilmar Mendes – j. 03-5-2011 – Dje 095 Div. 19-5-2011 Publ. 20-5-2011 – Ementário Vol. 02526-1 p. 42.

¹²⁰ *Habeas Corpus* – HC 100937/RS – STF – 2nd Panel – Unanimous – *Rapporteur* Justice Joaquim Barbosa – j. 7-12-2010 – Dje 020 Div. 31-1-2011 Publ. 1-2-2011 – Ementário Vol. 02454-3 p. 550.

¹²¹ *Habeas Corpus* – HC 203806/SP (2011/0084510-0) – STJ – 5th Panel – Unanimous – *Rapporteur* Justice Laurita Vaz – j. 26-6-2011 – Dje 28-6-2011.

¹²² *Habeas Corpus* – HC 185372/SP (2010/0171631-6) – STJ – 5th Panel – Unanimous – *Rapporteur* Justice Napoleão Munes Maia Filho – j. 31-5-2011 – Dje 28-6-2011.

¹²³ *Habeas Corpus* – HC 108349/RS (2008/0127720-0) – STJ – 6th Panel – Unanimous – *Rapporteur* Justice Maria Thereza de Assis Moura – j. 16-6-2011 – Dje 28-6-2011.

¹²⁴ In the first group, which emerged around the turn of the 20th century and is considered as the precursor of legal realism, is Justice Oliver Wendell Holmes Jr. The central idea of legal realism is in the acclaimed sentence of his book “*The Common Law*”: “The life of the law has not been logic; it has been experience”. See Holmes Jr., Oliver Wendell. *The Common Law* (New York, Barnes & Noble, 2004, Facsimile of the 1881 edition), p.1. The second group of legal realists appeared in the 1930s and includes, among others, the names of Jerome Frank and Karl Llewellyn as its main exponents. Bringing the various manifestations together, Cooper (2000, p. 59) thus summed up the thoughts of legal realism: “Law consists of a set of decision made by persons in power. These decisions are not necessarily rational. Judges have preferences and values, and their decisions, for good or ill, are affected by the inherited and acquired traits that they bring to the bench. The behaviour of judges is also affected, especially in appellate courts, by the fact that such courts are collegial bodies that operate with all the strengths and weaknesses imposed by small group dynamics”.

¹²⁵ See Nader (1995, p. 188).

In Brazil, it is becoming quite clear that the law consists of decisions made by persons in charge and the judicial decisions are included in this set. In other words, judges also make the law. This has progressively debunked the orthodox doctrine according to which judges must only apply pre-existent rules. That was a mistake, argue the “Brazilian realists”, because frequently judges make their decisions according to their own political or moral preferences and choose an appropriate judicial rule as a rationalization. These realists also demand a scientific approach that focuses on both what the judges say and on what they do, as well as on the real impact that their decisions have on the widest parts of Brazilian society. They say that it is crucial to understand all this very well so that the law can be progressively improved.

However, the eclectic views of American legal philosophy are better suited to the Brazilian tradition. Justice Benjamin N. Cardozo, seeing the law through a more varied perspective, can be cited as a perfect example of this kind of approach.¹²⁶ As it will be noted in detail later, Cardozo’s criticism to both declaratory and constitutive theories concerning the role of precedents in the making of law – that shows how dangerous the unrestricted adoption of any one of them is – fits perfectly with Brazilian law. Asserting that he recognizes “judge-made law as one of the existing realities of life”¹²⁷, Cardozo asks: “Where does the judge find the law which he embodies in his judgment?”.¹²⁸ And he answers: “There are times when the source is obvious. The rule that fits the case may be supplied by constitution or by statute”.¹²⁹ Nevertheless, he later emphasises: “It is true that codes and statutes do not render the judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. There are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated if not avoided”.¹³⁰ For Cardozo, truth is midway between the extremes that are defended at one end by Coke, Hale and Blackstone and at the other by such authors as Holland, Gray and Jethro Brown.¹³¹ Judges – in America or

¹²⁶ Cardozo, Benjamin N. *The Nature of the Judicial Process* (New Haven, Yale University Press 1991, facsimile of the 1921 edition).

¹²⁷ *Ibid.*, p. 10.

¹²⁸ *Ibid.*, p. 14.

¹²⁹ *Ibid.*, p. 14.

¹³⁰ *Ibid.*, p. 14.

¹³¹ *Ibid.*, pp. 124-125.

in Brazil – use several criteria¹³² to deliver their decisions, according to the circumstances and facts of the case in trial. Therefore, in common law countries, as well as in Brazil, from the work of filling in the gaps – the process used by the judge to decide a case that has no safe pre-existent reference (statute or case law) – decisions emerge that make new and binding law.¹³³

Indeed, as will be demonstrated throughout this thesis, from a theoretical point of view, there is no relevant difference between the process of production of case law in both civil and common law traditions. For positivism – which, although declining, is still the basis of two legal traditions – the role of a judge is to create rules (primarily, individual rules) based on the general norms of the respective legal system. These rules or case law – although they have different degrees of strength or bindingness in each tradition – is generated in the same way.

Finally, from the point of view of post-positivism in Brazil¹³⁴ (or of a neo-constitutionalism) – which brings into the law issues that were traditionally placed outside the borders of the law discourse: politics, fundamental social rights and, above all, a potential transformation of society through or by the law – the merging of Brazilian law into a common law perspective is even more necessary. The Brazilian legal system must give effect to the substantive constitutional norms, which, in turn,

¹³² Actually, in such cases, Cardozo (1991, facsimile of the 1921 edition, p. 30-31) proposes the following criteria to be used by the judge to decide: “The directive force of a principle may be exerted along the line of logical progression, this I will call the rule of analogy or the method of philosophy; along the line of historical development, this I will call the method of evolution; along the line of customs of the community, this I will call the method of tradition; along the line of justice, Morals and Social Welfare, the mores of the day, and this I will call the method of sociology”.

¹³³ The same happens in other civil law countries. Concerning Italy, for instance, Taruffo and La Torre (1997, p. 154) say: “the case in which on a given issue there are neither statutes nor precedents is rather infrequent in the Italian system at present, since the system includes thousands of precedents. However, the completely ‘new’ case does sometimes arise. In such a case judges do create new precedents, since they are obliged to decide every case submitted to a court, and must find a legal basis to decide any case. Sometimes they must look for a new solution. However, the decision concerning the new issue is not created *ex nihilo* or directly based upon substantive reasons or policy and value judgments, or on reasons of justice related to the facts of the case. Since the general principle is that every judgment should be based upon legal rules, the courts always look for arguments supporting the new precedent. Then the new judgment never is “naked” or grounded barely on policy arguments. It is usually supported by arguments connecting it, by means of more or less long and loose chains of passages, to a statutory rule or to a general or a constitutional principle, or at least to another precedent concerning a similar or related matter. Judges do perceive the “novelty” of a case or of an issue, and sometimes they even stress this. However, they try to demonstrate that decision, although dealing with a new topic, is consistent with the existing statutory, constitutional or case law. They present their decision as a rationally justified and coherent development of the existing legal system rather than as a break or a jump”.

¹³⁴ Concerning a post-positivist approach to precedents in Brazil, see Bustamante (2007, above all pp. 119-218) and Tavares, André Ramos. *Nova lei da súmula vinculante: estudos e comentários à Lei 11.417 de 19.12.2006* (São Paulo, Método, 2007), pp. 37-47.

protect values such as equality, certainty and speed in judicial decisions.¹³⁵ Faced with this necessity, the Brazilian state, taking into consideration these values, is obliged to adopt mechanisms that improve the performance of the Judiciary as a whole. Certainly, one of the measures to be taken is precisely the adoption of an effective model of binding precedents.

2.5 Declarativity and Creativity of Precedents in Brazil

2.5.1 The Issue

A precedent can be defined as “an adjudged case or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising on a similar question of law”.¹³⁶ From the reunion of this definition and the meaning of the expression common law as a kind of written law formed by precedents, emerges a question which has been constantly debated in the specialized Anglo-American literature: does a precedent (or the wide group of precedents, here denominated common law) really make the law itself or does it only declare the pre-existent law (legislated or not)?¹³⁷ Naturally, the same kind of question has also been posed by Brazilian scholars when they argue that any doctrine of precedent will raise problems in relation to what is to be recognised as the law, especially in a civil law country such as Brazil.

Addressing this question, two different points of view (about the nature of the judicial precedent) have divided the attention of jurists: the declaratory (or orthodox) theory and the constitutive theory.

The first point of view, which can be referred to as the declaratory or orthodox theory, asserts that the law pre-exists judicial decisions. The existence of law, sometimes legislated, other times customary (of immemorial use and universally

¹³⁵ See Ataíde Júnior (2012, pp. 109-112).

¹³⁶ See Black (1990, p. 1.176).

¹³⁷ These kinds of questions are posed by Cross and Harris when they recognise that the English doctrine of precedent “raises problems in relation of any proposed definition of law”. For methodological purposes, they concentrate on two types of question: “(i) Does the proposed definition include the *rationes decidendi* of cases as well as the contents of legislation? (ii) Does the proposed definition include rules which confer authority on the *ratio decidendi* of a case, i.e. the rules by virtue of which a particular ratio has the force of law?”. See Cross, R. and Harris, J. W. *Precedent in English Law* (4th ed, Oxford, Clarendon Press, 2004), p. 208.

recognized in the country), is independent of the judicial decisions, which are nothing more than a mere declaration or evidence of its existence.^{138,139} This theory, besides being adopted by renowned authors, both old (Hale, Blackstone and Carter¹⁴⁰, for instance) and modern (especially in England but also in the United States of America), has been accepted many times in courts.¹⁴¹

The second position, dominant nowadays (especially, in the United States), is known as the constitutive theory and understands that the law is made by judicial decisions, that is, “judges-make law”. Paradoxically, it was a natural consequence of the long historical evolution of the declarative theory. Indeed, if the judicial decisions, in common law countries like England, are “the” clear revelation of the existent law, precedents have the tendency to become “the” sources of law.¹⁴²

The principal arguments for the constitutive theory are born precisely out of criticism of the declaratory theory. Authors such as Gray, Holmes, Cardozo, Pound and Salmond assert that it is a puerile fiction to conceive law as existing independently of, and previous to, the judicial decisions. On the contrary, they defend the idea that common law is not composed of immemorial customs, but by the norms made by the judges when they decide concrete cases submitted for their consideration.¹⁴³ Gray, making a deep critical analysis of the theses defended by

¹³⁸ For a historical perspective of the relation between customs and case law in common law countries, see Ascensão, J. Oliveira. *Fontes do direito no sistema do common law. Revista de Direito Público – RDP*, n. 35-36, jul./dez. 1975, p. 9.

¹³⁹ Although the exact origin of declaratory theory is imprecise, it is known that its first formulation was made by Hale. See Hale, Matthew. *The history of Common Law* (4th ed, London, [NIA], 1779). Nevertheless, its classic formulation is found in the Blackstone's *Commentaries on the Law of England*. In the cited work, answering the question about how to know or to prove that some norm has, for its immemorial and universal use, validity and force of law, Blackstone asserts that judges “are the depositary of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land (...)”. See Blackstone, William. *Commentaries on the Law of England*, vol 1 (Chicago and London, The University of Chicago Press, 1979, facsimile of 1st edition published in 1765-1769), p. 69.

¹⁴⁰ See Carter, James Coolidge. *Law: its Origin, Growth and Function* (New York and London, The Knickerbocker Press, 1907).

¹⁴¹ The US Supreme Court's decision in *Ray v Western Pennsylvania Gas Co.* [1891] 138 Pennsylvania 576, 20 Atl. 1065 constitutes an example, because, in this case, it was said that the courts of the highest authority in every state of the United States are sporadically obliged to change the rules about major questions. It was also said that doing this does not mean that the law changed, but that the court was wrong in its first decision, and that law is, and actually has always been, as exposed to the latest decision on the matter. It cannot be said that the judges make or change the law. They simply expose it and apply it to individual cases.

¹⁴² See Ascensão (1975, p. 9).

¹⁴³ See Sesma, Victoria Iturralde. *El precedente en el common law* (Madrid, Civitas, 1995), p. 28-29.

Carter and Blackstone, states that the declaratory theory must be understood as some form of resistance of jurists to the recognition of the fact that the courts, with the state's consent, have applied, in the process of decision making, norms that did not pre-exist and that consequently could not be known by the parts and lawyers when the dispute took place. It is, Gray says, resistance to the certain fact that the courts are continuously making *ex post facto* law.^{144,145,146}

According to the defenders of the constitutive point of view, in any legal system, innumerable solutions found by the courts concern matters that were not – and could not have even been – previously imagined by the Legislature, which is limited by the necessary generality and abstraction of the norms that it produces. In regards to these cases, in which the norm is only found in the decisions of the courts, it would be a mistake to state that such solutions or “the law” already pre-existed in the legal system.¹⁴⁷

2.5.2 The Debate Surrounding the Violation of the Principle of Separation of Powers and Other Relevant Questions

¹⁴⁴ See Gray, John Chipman. *The Nature and Sources of the Law* (2nd ed, New York, The Macmillan Company, 1924), above all p. 99.

¹⁴⁵ On judges as rule makers, see a critical analysis in Alexander, Larry and Sherwin, Emily. *Demystifying Legal Reasoning* (Cambridge and New York, Cambridge University Press, 2008), pp. 107-125.

¹⁴⁶ In England, there has also been strong criticism against the declaratory doctrine. Jeremy Bentham, for instance, called the declaratory theory a dog-law. See Bentham, Jeremy. *Truth Versus Ashhurst; or the Law as it Is, Contrasted with What it Is Said to Be. The Works of Jeremy Bentham*, vol 5 (Edinburg, William Tait, 1834), pp. 232-238. And John Austin called it an infant fiction. See Austin, John. *Lectures on Jurisprudence, or the Philosophy of Positive Law*, vol 2 (5th ed, London, John Murray, 1911), p. 634.

¹⁴⁷ Finally, it is important to be reminded that, even in England, in its former highest court of justice, the House of Lords, it was recently affirmed that judges make law. This is moderately true, because of the frequently used argument “leave it to Parliament”. For instance, Lord Lloyd stated in *R v Clegg* [1995] 1 ALL ER 334: “I am not averse to judges developing law, or indeed making new law, when they can see their way clearly, even where questions of social policy are involved. A good recent example would be the affirmation by this House of the decision of the Court of Appeal (Criminal Division) that a man can be guilty of raping his wife (*R v R* – (rape: marital exemption) [1991] 4 ALL ER 481, [1992] 1 AC 599; [1991] 2 ALL ER 257, [1991] 2 WLR 1065). But in the present case I am in no doubt that your Lordships should abstain from law-making. The reduction of what would otherwise be murder to manslaughter in a particular class of cases seems to me essentially a matter for decision by the legislature, and not by this House in its judicial capacity. For the point in issue is, in truth, part of the wider issue whether the mandatory life sentence for murder should still be maintained. That wider issue can only be decided by Parliament. I would say the same for the point at issue in this case. Accordingly I would answer the certified question of law as follows. On the facts states, and assuming no other defence is available, the soldier or police officer will be guilty of murder, and not manslaughter. It follows that the appeal must be dismissed”.

Although it is noticeable that the declaratory theory, which affirms judges do not create law at all, has not long been accepted without some reserve¹⁴⁸, currently traces of its persistent influence can still be found in Brazil.¹⁴⁹ The defenders of declaratory theory in Brazil have some plausible arguments against the possibility of judicial law making, especially constitutional and philosophical arguments.

Firstly, there is the doctrine of the separation of powers, encapsulated in the Brazilian Constitution, which recommends that the legislative, judicial and executive functions of the State should be exercised by separate bodies. The possibility of the courts to make law would represent a clear breach of the doctrine.¹⁵⁰

Secondly, it is also questioned, if the decisions of the courts create law, why only some courts, precisely those in the appropriate hierarchical relationship to the

¹⁴⁸ Martin asserts: "Although there used to be a school of thought that judges did not actually 'make' new law but merely discovered it, today it is well recognized that judges do use precedent to create new law and to extend old principles. There are many areas of law which owe their existence to decisions by the judges". See Martin, Jacqueline. *English Legal System* (London, Hodder & Stoughton, 1999), p. 31.

¹⁴⁹ Evidently, in civil law countries, it would be a clear mistake to follow the opposite direction. From the suggestion that the law is only made by judges, it would be possible to be wrongly led to the extreme conclusion that customs, for instance, no matter how firmly established, are not law, until adopted by the courts, and even statutes are not law because the courts must establish their meaning. With respect to the same problem in common law countries, see Cardozo (1991, facsimile of the 1921 edition, p. 124-125).

¹⁵⁰ This question of the limits of judicial power is not exclusive to Brazil. In all legal systems with a civil law background, such as France, for instance, there has been a similar defiance to the expansion of judicial law making. In regards to the French doctrine of the separation of powers, Steiner states: "Set against judicial law making is the constitutional theory, derived from a rigid doctrine of separation of powers, by which law is strictly a matter for the legislature, not the judiciary. Under this doctrine, the function of judges is solely that of adjudicating by applying the law originating from Parliament to legal disputes brought before them. Montesquieu's famous work, *The Spirit of Laws* (1748), is often quoted as having been strongly influential with regard to this approach. In one of the most important chapters (Book XI, Chapter VI) of his work, Montesquieu indeed refers to every judge merely being 'the mouth that pronounces the words of the law', or to judicial decisions being 'never anything other than the exact text of the law'. However, on closer scrutiny, Montesquieu's comments did not apply to judicial decisions generally, but only to criminal rulings. In this respect, Montesquieu was particularly concerned that, if judges were given too much discretion in this area, the individual's civil liberties would be undermined. Nevertheless, Montesquieu's statements have been construed more widely by the watchdogs for the separation of powers' with the intention of confining the judicial function, as a general rule, to the role of 'saying' what the law is when resolving a legal dispute. The judicial submission to the enacted law is even enshrined in the term used in French to describe the word 'court'. This term, *jurisdiction*, coming from the Latin phrase *juri dictio*, means 'to say what the law is'. See Steiner (2010, p. 87). But even in France, Steiner (2010, p. 85) states, despite this settled idea that law can only be created by the Legislature, discussion about the nature of this "true phenomenon" of judicial law making, as in others legal systems, has been a "never-ending story". As will be seen here, judicial reasoning – in France, Brazil or anywhere – is a much more sophisticated process than the simple act of declaring what the law is.

deciding court, are bound by those decisions. If the precedent contains the law, those courts, which are not bound by it, would not be acting under the law.¹⁵¹

Thirdly, some scholars in Brazil, such as Alvim, argue that the judge, by basing his/her decision on authentic analytical judgments, even with the case of gaps in the law, will always be only an explainer of the system. This way, even “making” a norm, the judge will be bound, to a certain degree, by: (i) the constitutional structure itself; (ii) the infra-constitutional legal system, in general, in the sense that the “judicial norm” to be made cannot ignore or be incompatible with the principles of the system. On account of the fact of this existing limitation, even in such cases that whereas, apparently, the judge would have the authentic power to create law, this – they defend – is logically impossible. In cases of analogical application of a legal provision or a general principle of law, for instance, there is a gap in the statutes’ framework, but not in the legal system, which is, by definition, complete (the logical plenitude of the legal system). In these cases, the judge just explains, within the system, the manner and the form through which the concrete case should be solved. Notwithstanding, the judge’s work, instead of being based upon a statute identified in the light of the judicial facts that were brought to him, will consist, before the lack of statutes, in a search into the system as a whole. It is normally said that such a search consists of a form of integration of the judicial system (that is, something is aggregated to it), but what occurs is simply that the system is unadulterated and its norms are applied to solve controversial concrete cases, not subsumed under a pre-existent statute.¹⁵²

Nevertheless, with both positions in mind (declarative and constitutive), even in a historically civil law country such as Brazil, all these arguments can be surpassed.

As for the first argument, relating to the theory of separation of powers, it is possible to counter that this theory is not so strict to the point of totally precluding the exercise, by one of the State’s powers, of a function usually attributed to another power. Actually, the theory of the separation of powers, although understood as being fundamental for political power to take action, does not deserve the almost

¹⁵¹ With regard to English law and similar criticism, see McLeod, Thomas Ian. *Legal Method* (8th ed, London, Palgrave Macmillan, 2011), p. 128.

¹⁵² See Alvim, Arruda. *Sentença no processo civil: as diversas formas de terminação do processo em primeiro grau*. In Alvim, Arruda. *Processo civil 2* (Coleção estudos e pareceres, São Paulo, RT, 1995), pp. 289-290.

religious reverence that it occasionally receives. Once it is not a scientific classification of the State's functions or a dogma of the democratic system, it is a recipe of liberty whose practical value depends on circumstances.^{153,154}

Currently, Brazil has seen the development of a new conception of the principle of separation of powers. This new constitutionalism abandons the idea of a rigid *separation des pouvoirs* and confirms the idea of a sharing of powers.¹⁵⁵ Actually, in the contemporaneous Brazilian constitutionalism, the examples of exercise by one of the State's powers of another power's typical function are widely known, such as the very important judicial review of legislation. The centralised and abstract judicial review of legislation by the Supreme Court in Brazil, which no one opposes, certainly represents a kind of negative legislative activity, to use the kelsenian expression.

In Brazil, as Dinamarco states, it is also notable that, after the advent of the Constitution of 1988, the procedural system of legal protection has been changing from an individual to a collective perspective (with the fast development of the class actions, for instance). Although in this transmigration an abandonment of the individual protection cannot be seen, such movement means that the contemporaneous judge in Brazil does not manipulate exclusively individual cases (atomic cases, in Watanabe's terms), but also those which, for the massive impact they can have, involve an impressive part of the community. This new posture constitutes an open path to the overcoming of that rigid logical scheme of strictly deductive nature, which tended to reserve the abstract and generic treatment of law to the Parliament and to confine the judge to the scope of concrete, specific and individual businesses.¹⁵⁶

¹⁵³ See Cunha, Fernando Whitaker da. *Teoria geral do estado: introdução ao direito constitucional* (Rio de Janeiro, Freitas Bastos, 1990), p. 447.

¹⁵⁴ The theory of the separation of powers, as Cunha (1990, p. 447) states, was foreseen by Aristotle, drafted by the Tang Dynasty in China in the 7th century, schematised by Saint Thomas Aquinas and broadly formulated by Montesquieu. The French Revolution, however, relying on the distrust to the judges of the Ancient Regime, developed a rigid conception of separation of powers. According to Cappelletti, ideologically, the triumphant ideal was that, "rousseauist" (from Rousseau), according to which the power to create law might be exercised by the Parliament (the representatives of the sovereign people) and nothing else was expected from the judges but the passive, dry and "unanimated" application of the law. See Cappelletti, Mauro. *Constitucionalismo moderno e o papel do Poder Judiciário na sociedade contemporânea*. *Revista de Processo*, v. 15, n. 60, out./dez. 1990, pp. 111.

¹⁵⁵ See Cappelletti (1990, pp. 111-112).

¹⁵⁶ Dinamarco (2002, p. 1.135).

Furthermore, based on a neo-constitutionalist interpretation of the Federal Constitution of 1988 – which brings into the law issues that were traditionally placed outside the borders of the law discourse: politics, fundamental social rights and, above all, a potential transformation of the society through or by the law – the Brazilian legal system, as already stated, must give effect to the substantive constitutional norms, which protect values such as equality, certainty and speed in judicial decisions. As already said, the Brazilian state is obliged to adopt mechanisms that improve the performance of the Judiciary as a whole. One of the measures to be taken is the adoption of an effective model of creative and binding precedents.¹⁵⁷

Indeed, it has become progressively clear in Brazilian judges' mentality that the Judiciary, constituted by the State to administer justice on the State's behalf, detains part of the State's political power. It is illogical to consider as non-law-marker the Judiciary when it, (above all) in the absence of a statute rule, has permission to supplement the Legislature; as the courts must decide cases, they must do it for all the State's purposes. Thus, the law the judges apply is the State's law, whether they find it formulated in statutes or that they had to formulate it themselves.^{158,159}

The second argument – precedents cannot be considered as law makers because they have different criteria according to the court to which they are presented (for instance, a precedent does not bind a court that, in the hierarchy of the judicial system, is higher than the court from which this precedent is originated) – is also surmountable. Firstly, it is something that originates from the nature of things themselves: the court hierarchy is fundamental to the theory of *stare decisis* as well as the hierarchy of legal norms, with the supremacy of the constitution, is fundamental to the function of the legal system of any country. Besides, the fact that norms are applied in one case but not in another is a phenomenon that is commonly

¹⁵⁷ See Marinoni (2010b, pp. 204-205).

¹⁵⁸ See a similar argument in Dabin, Jean. Teoria geral do direito. In Morris, Clarence (org). *Os grandes filósofos do direito* (Reinaldo Guarany tr, São Paulo, Martins Fontes, 2002), p. 476.

¹⁵⁹ However, some Brazilian scholars, such as Streck, say that any attempt to elevate the Judiciary, which is not elected in Brazil, above the Legislature is antidemocratic. They stress that in a democratic system, despite the fact that judges are given functional independence to achieve the desideratum of what is the democratically declared fair by the Constitution, they (the judges) must be prevented from acting by pure activism or voluntarism. See Streck, Lênio Luiz. *Súmulas no Direito Brasileiro: eficácia, poder e função: a ilegitimidade constitucional do efeito vinculante* (2nd ed, Porto Alegre, Livraria do Advogado, 1998), p. 243.

accepted in law. In Brazil, simple examples can be found in diplomatic¹⁶⁰ and parliamentary¹⁶¹ immunities and tax exemptions.¹⁶² They are distinctions that, if not originating from the nature of things, are also commonly accepted as characteristics of the legal system to assure its own effectiveness.

Thirdly, refuting the argument developed by Alvim, the fact that the judicial system is hermetic – which is unquestionable, because, by definition, there will be solutions to every emerging law question – does not mean that since its establishment it has become complete, that it is impossible to gradually add to it with new norms or to make new law. Of course, the Brazilian legal system is always in evolution. Law is made daily, and to prove this it is enough to refer to the daily fact that new statutes are constantly enacted and come into operation, which evidently makes new law. Obviously, the same can be said in favour of the law-making role of precedents: the system is hermetic, once there are solutions in it to all the questions emerged. Certainly, this is enough for the definition of the plenitude of the system. However, with the new judicial decision, especially the one that is about a theme which has not been legislated yet, a new norm is created – law is created – that is aggregated to the system.

2.5.3 A Critical Systematisation

All this necessarily leads to a classification of the precedents in Brazil (as everywhere)¹⁶³ into: declaratory precedents or constitutive precedents. It is declaratory the precedent that only recognises and applies a pre-existent rule (commonly statutory law), while the constitutive or creative precedent is the one that creates and applies a new rule. In the first case, it is possible to say, the norm is

¹⁶⁰ See the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963, which were incorporated into Brazilian Law by the Legislative-Decrees 56435/65 and 61078/67, respectively.

¹⁶¹ According to article 53, *caput*, of the Federal Constitution, Deputies (Members of the Chamber of Representatives) and Senators are inviolable for any of their opinions, words and votes.

¹⁶² In Brazil, article 150 of the Federal Constitution provides a varied typology of tax exemptions, including exemptions in favour of governmental entities, political parties and religious organizations or even ones related to the publishing of newspapers, books, periodicals and the paper utilised in their printing.

¹⁶³ See Sesma (1995, p. 33).

applied because it already constitutes law, whereas, in the second, the norm becomes law for the future because it is now applied.

In Brazil, declaratory precedents, such as in other countries of Latin origin, are also named precedents *secundum legem*. According to Steiner, this “category refers to judicial function of applying and interpreting existing rules”.¹⁶⁴ In other words, judges act within the boundaries established by the wording of the statutes and codes, especially defining the meaning and the scope of their provisions.

On the other hand, constitutive precedents are sometimes called precedents *praeter legem*. In this sort of precedent, commonly in the absence of statutes regulating the matter, the courts go beyond interpretation and create new rules. In a more subtle sense, it can be said that a creative precedent is either the judgment that decides a new legal question for the first time, or even a judgment that decides a legal question in a new or especially original manner. In Brazil, these constitutive (or *praeter legem*) precedents are supplementary and should be consistent with the legislation as a whole, above all the Federal Constitution.¹⁶⁵ All of these precedents are linked with legislated norms or norms that should have been legislated, originally interpreting them, occupying the spaces left by them or expanding the limits previously established by them (legislative provisions).¹⁶⁶

In Brazil, the declaratory precedent is more common than the constitutive one. Many areas of law in Brazil are shaped by the legislation or even codified. Indeed, the majority of the issues that the courts deal with have been already regulated by legislative acts (or even by previous judicial decisions), meaning that what is left to new judicial decisions is only to declare or confirm this pre-existent law. However, as it happens in France, for instance, it is with constitutive precedents that judicial law making has been at its most creative in Brazil.¹⁶⁷ Although far fewer in number, constitutive precedents are as important as, or more important than, declaratory precedents, once they make law where it did not previously exist.

¹⁶⁴ See Steiner (2010, p. 108).

¹⁶⁵ Precedents can also be considered *contra legem*. In this category, the court establishes a rule that contradicts a clear legislative provision. Apart from the exceptional case that the legislative provision itself is unconstitutional or contradicts other legislative acts, this sort of precedent is not allowed in Brazilian law.

¹⁶⁶ In Chapter 5, it will be seen that the validity of the statements of the new Supreme Court Binding *Súmula* – as a characteristic that has special contours in the Brazilian legal system, which is related to the civil law tradition – is conditioned by the support it has on the legislated norm.

¹⁶⁷ See Steiner (2010, p. 108).

Besides, it is necessary to note that in Brazil both precedents (declaratory and constitutive) are to be considered sources of law (as *de facto* sources or even, as many scholars already accept, as a formal source). As for declaratory precedents, it does not matter the fact that there is previous law concerning the same point of law that they encapsulate. Declaratory precedents clarify the contents of the laws, make them more precise and concrete, and effectively influence the judge's future decisions. Regarding the constitutive precedents, the idea that both legislators and judges shape the law appears to be common sense in Brazilian jurisprudence. Although constitutive precedents can be considered new sources of law, while the declaratory is not, both act as paradigms for further similar cases. Thus, the division of the task of the Brazilian courts into two activities – the declaration of pre-existing laws on the one hand and the law-creation on the other – is undeniable.¹⁶⁸

2.6 Persuasive and Binding Precedents in Brazil

2.6.1 The Issue

In general terms, it can be said that the decision of a case taken previously by the Judiciary constitutes, in cases that are similar to it, a precedent. In other words, a precedent means a decision that is taken as somehow related or possibly influencing the decision of a following case. With no great effort it can be seen that precedents exist in any judicial system. Their attributes, however, such as their persuasive or binding character (or their creative or merely declaratory power, as was seen earlier), depend on the outlines attributed to them by the established legal system.

In Brazil, every precedent has some authority and, in general terms, it can be said that the degree of authority of precedents follows the traditional parameters: (i) sometimes, the authority of a precedent may depend on the correctness of its rationale. The judge of a case, before whom the precedent is presented, is not bound to follow it so that the allegation of the precedent itself does not dismiss the demonstration of the goodness of the position taken. Thus, it is only a persuasive precedent; (ii) the authority of a precedent may be affirmed by itself and may impose a solution to a new case, unless a better alternative reason is presented. This means

¹⁶⁸ For a similar scenario in civil law Russia, see Vereshchagin (2007, p. 90).

that there is a strong presumption in favour of the precedent so that, only in exceptional cases, can it be disregarded, which implies a relatively binding precedent; (iii) besides, certain precedents can be binding on some cases and persuasive on others and they are considered as another kind of relatively binding precedent. That is because, although the origin of the precedent is one of the attributes considered in establishing the binding character or not of the precedent in a certain case, this character also depends on the hierarchy of the court where the precedent is being cited. For instance, the precedent of a certain court binds those courts that are lower than it but does not do so with higher ones; (iv) finally, the authority of the precedent can be so absolute that, even provided that it is a mistake, the court cannot depart from it. It is an absolutely binding precedent.^{169,170,171}

The task now is to systematise the actual extent of this authority or, in other words, to show how and in what degree do precedents influence the decisions of similar cases in Brazil. The classification of precedents into two great categories – persuasive precedents and binding precedents – must be kept.

2.6.2 Persuasive Precedents

As stated earlier, a precedent is persuasive if the judge of the case, before whom the precedent is present, is not bound to follow it. If the precedent is followed, it is because the judge is somehow convinced of its appropriateness. Since the Brazilian legal system is not based upon a general doctrine of *stare decisis*, most precedents are still persuasive.¹⁷² The key consequence of this is that in Brazil, as a

¹⁶⁹ See Ascensão (1975, p. 16) that, considering Cross and Farnsworth's opinions, although using different terms from the ones seen here, managed to sum up the outlines of the traditional classification of judicial precedents with regard to their authority.

¹⁷⁰ It is important to register that there are other classifications of precedents with regards to their authority. For instance, Peczenik sees bindingness as follows: (i) Formal bindingness; (ii) Not formally binding but having force (iii); Not formally binding and not having force but providing further support (iv), and Mere illustrativeness or other value. See Peczenik, Aleksander. The Binding Force of Precedent. In MacCormick, Neil and Summers, Robert S. (eds). *Interpreting Precedents: a Comparative Study*. Aldershot/England, Ashgate/Dartmouth publishing, 1997), pp. 461-469.

¹⁷¹ In his successful attempt to explain the judicial law-making in Russia, Vereshchagin (2007, p. 112) provides the following classification: (a) binding precedents; (b) not binding but persuasive; (c) providing further support; and (d) illustrative.

¹⁷² To illustrate, the same happens in France, which also follows the civil law tradition and where there is no formal bindingness of previous judicial decisions. With respect to the persuasiveness of precedents in France general, see Steiner, Eva. *French Legal Method* (Oxford, Oxford University Press, 2006), pp. 75-108 and Troper, Michel and Grzegorzczak, Christophe. Precedents in France. In

rule, courts (including single-judges courts) do not have to follow the previous decisions of superior courts, the decisions of courts in the same hierarchical level or what they have already decided themselves. If they follow – and they frequently do – it is due to the persuasiveness of the precedent.¹⁷³

There is no official rule to categorise precedents according to the degree of their persuasiveness. The degree of persuasion of a persuasive precedent depends, besides the soundness of the proposition itself, on many other factors, such as: the hierarchical rank of the court that pronounced the decision, the reputation of the court, the prestige of the judge who conducted the decision, the decision's date or age, if it was taken by a panel or by the full bench, if it was unanimous or not, if the precedent represents a trend, the quality of the arguments, the branch of law involved, changes in the political, economic and social background, among others.^{174,175,176,177,178,179}

MacCormick, Neil and Summers, Robert S. (eds). *Interpreting Precedents: a Comparative Study* (Aldershot/England, Ashgate/Dartmouth publishing, 1997), pp. 103-140.

¹⁷³ There are examples of binding precedents in Brazil, which will be later referred in this chapter and completely addressed in Chapters 4 and 5.

¹⁷⁴ About the adoption of similar criteria in France, see Troper and Grzegorzczuk (1997, pp. 121-125).

¹⁷⁵ Concerning Italy, see Taruffo and La Torre (1997, pp. 159-161) and Taruffo, Michele. Institutional Factors Influence Precedents. In MacCormick, Neil and Summers, Robert S. (eds). *Interpreting Precedents: a Comparative Study* (Aldershot/England, Ashgate/Dartmouth Publishing, 1997), pp. 437-460.

¹⁷⁶ With regards to German, see Alexy, Robert and Dreier, Ralf. Precedent in the Federal Republic of Germany. In MacCormick, Neil and Summers, Robert S. (eds). *Interpreting Precedents: a Comparative Study* (Aldershot/England, Ashgate/Dartmouth Publishing, 1997), pp. 34-36.

¹⁷⁷ An interesting situation has happened in the American State of Louisiana, where, in contrast to the rest of the United States, the legal system is associated with the civil law tradition. In Louisiana, usually, as Dennis observes, the degree of persuasion of a precedent is determined by the larger or smaller proximity of its methodology to a specific codified law. For instance, four different processes may have been decided through four similar but distinct methods: the first, by analogy with a specific codified norm; the second, by analogy with a Code's principle extracted from several norms; the third, by analogy based upon the system of the Global Code; and the fourth, by the independent objective search not related to a systematic or statutory analogy. By evaluating these cases as precedents, without any other factors, the judge must attribute bigger persuasive authority to the first process and a smaller, successive value, to each one of the other processes. It is justified to classify the precedents in a hierarchy of persuasive values because, the more the previous decision is linked to a specific codified norm, the more it is certain that the precedent is close to the principles and guidelines of the lawmaker. The judge's position as a provisional rule maker, and not as an equal lawmaker, means that he has the duty to restrict himself as much as possible to the principles and guidelines of the lawmaker. See Dennis, James L. *Uso do precedente no Código Civil da Luisiana. Revista de Direito Público – RDP*, v. 20, n. 82, abr./junho 1987, pp. 35-36. About the Louisiana legal system and the sources of law, see also: Yiannopoulos, A. N. *Louisiana Civil Law System*. Coursebook, pt 1 (Baton Rouge, Claitor's Law Books/Claitor's Publishing Division, 1977, second printing 1993), pp. 45-65.

¹⁷⁸ Certainly, examples of persuasive precedents can be seen in England, where there are: (i) decisions of English courts lower in the hierarchy. For instance, the Supreme Court may follow a

However, it is possible to elaborate a list of factors that might influence a court's decision to follow or not a relevant precedent:

(i) The hierarchical rank of the court setting the precedent is one of the most important factors. Although lower courts, as a rule, are not formally bound to apply them, they are expected to take into due account precedents of the higher courts. On the other hand, a precedent of a court belonging to the same rank is considered less effective than a precedent of a higher court. Previous decisions of lower courts are considered less persuasive and, when a decision of a lower court is quoted in a higher court decision, it is an example rather than an influential precedent. It can be said that the decisions of the Federal Supreme Court (even those that are not considered formally binding) and the decisions of the four Superior Courts are considered far weightier than those of other courts (appellate courts and trial judges). A precedent of a court of appeal is deemed very persuasive by trial judges when the precedent is of the same appellate court that would review the judgment on appeal. Finally, courts have a factual tendency to follow their own previous decisions more strictly than precedents of other courts of same hierarchy.

(ii) A decision of a court is considered more influential when it has been pronounced by full bench, by the special court¹⁸⁰ (in the Superior Court of Justice, for instance) or by a criminal or civil section¹⁸¹ of a court than when it has been delivered by a small panel or by a single judge on behalf of the court. Sometimes, indeed, the Supreme Court (and its Justices), when it is dealing with especially important issues and expected to deliver a judgment that should influence subsequent cases, rather prefers – and it has regimental permission to do this – to decide in full bench rather than by a panel or by a single judge on behalf of the court.

(iii) The reputation of the court – that is, the conservatism or progressiveness of the court concerning certain agenda, the quality of its previous decisions, the authority of the court or the panel on given matters, the acknowledge independence of its judges, among other factors – does play an important role in determining the persuasiveness of its decision. As for the Brazilian law, as a matter of principle, the judges' prestige is something that is hard to consider because, in theory, all judges of a court have the same status (except, perhaps, in a certain sense, the president). However, since it is always made

Court of Appeal's decision and the Court of Appeal may follow a High Court's decision, even though they are not bound to do so; (ii) decisions of the Judicial Committee of Privy Council; (iii) decisions of courts from Scotland, Ireland, the Commonwealth (especially, Australia, Canada and New Zealand) and the United States. This is presented as especially appropriate when there is an insufficient or absolute absence of any English authority on the object of the debate; (iv) *obiter dicta* of the English judges (the concept of *obiter dicta* will be developed later). See Sesma (1995, p. 36).

¹⁷⁹ For a different view about why to follow precedents, see Duxbury, N. *The Nature and Authority of Precedent* (Cambridge, Cambridge University Press, 2008), pp. 150-183.

¹⁸⁰ According to the Brazilian Constitution (article 93, XI), in courts with more than twenty-five judges, a special body may be constituted, with a minimum of eleven and a maximum of twenty-five members, to exercise the administrative and jurisdictional duties delegated by the full court, one half of the members being chosen by seniority, and the other half by voting of the full court.

¹⁸¹ This is a reunion of panels and can be also called "great panel".

public which judge wrote which opinion, the reputation (as certain judges are known to be particularly wise in certain matters) is also relevant. In practice, the decisions of some judges are considered more respectfully than others.

(iv) If there is some formal dissent, it is always stated in the decision, which is labelled as “by majority”. If not, the decision is labelled as “unanimous”. The dissenting opinion(s) is (are) sometimes published together with the majority opinion. Therefore, the presence or absence of dissent might influence the weight given to the precedent.

(v) The age of a precedent is also a relevant factor. A definite opinion about the issue does not yet exist, but new precedents are generally considered more influential than the older ones. Old precedents should be considered with caution simply because the law in Brazil is very changeable. They tend to be considered as being somewhat superseded and have little influence when the social, political and economic background has changed and, especially, when the legal basis of the issue has changed. Evidently, no value at all can be ascribed to old precedents that have been explicitly overruled or superseded by newer ones.

(vi) Whether the precedent represents a trend or is part of a line of decisions is also highly relevant. In particular, if a court adheres to its own prior decisions, this is a clear indication that it will not alter its understanding.

(vii) Changes in the social, political and economic backgrounds are especially relevant. Changes in these backgrounds since the date of the precedent are considered sufficient reasons to not apply it. Such an argument is invoked daily by courts as a justification for not following an old precedent or even to set a new interpretation on it. On other hand, a new precedent will be considered highly influential when it effectively reflects the new political, economic and social panorama.

(viii) Obviously, legislative changes in related areas since the prior decision took place are also considered highly relevant as the Brazilian legal system, historically linked with the civil law, is primarily based on codes, statutes and the Federal Constitution.

(ix) Another important factor is whether a certain field of the law is completely or mostly regulated by legislative provisions, because, where they are lacking – such as in the cases of administrative, labour and social security law, which are not codified in Brazil –, precedents play, in terms of frequency and decisiveness, a more significant role. Besides, significant importance can be perceived among the uses of precedents in constitutional, electoral and tax law, supposedly due to the fact that cases in these areas deal mainly with legal issues while in others areas, such as criminal law, judges often devote their main attention to issues of fact.

(x) Certainly, the proper soundness of the supporting arguments in the decision is of greatest importance for subsequent cases. It can be said that this soundness (or high persuasiveness) of the arguments is frequently the

main reason for following a precedent. In particular, the soundness is especially relevant when a very new precedent is considered to be followed, when a precedent (generally, an old one) is debated in order to decide whether to overrule it or not, or when there are conflicting precedents.

2.6.3 Binding Precedents: the Debate Surrounding the Violation of the “Principle of the Rational Persuasion of the Judge”

One of the objections, probably the most common, raised against the adoption of any doctrine of binding precedent in Brazil – and more specifically to the new Federal Supreme Court’s Binding *Súmula* – is that this would change the judge’s decision into a simple mechanism of applying the existent precedent to the case on trial.¹⁸² The judge would lose his free conviction to decide and would be completely prevented from departing from a precedent, although he/she considered it wrong. It is argued that judges in Brazil are constitutionally independent and bound only to the Constitution and statutes, and they cannot be bindingly submitted to any judicial previous decisions.¹⁸³

But those in Brazil who have a minimum knowledge about the theory of *stare decisis* as it is applied in common law countries know that this is not true. Actually, although the doctrine of binding precedent (or *stare decisis*) means that judges must follow precedents, in practice the judicial decisions, in systems informed by any rule of binding precedent (England and the United States are examples of this), are neither neutral nor mechanical. The rule is to follow the precedent, but, often, for several pertinent reasons, a court may depart from an (apparently) binding precedent. In England, Elliot and Quinn explain that, “in theory, only the Supreme Court [formerly, the House of Lords], which can overrule its own decisions as well as those of other courts, can depart from precedent: all other courts must follow the precedent that applies in a particular case, however much they dislike it”. However, “there are a number of ways in which judges may avoid awkward precedents that at first sight might appear binding”.^{184,185}

¹⁸² Criticising this objection, see Marinoni (2010b, pp. 205-210).

¹⁸³ According to Vereshchagin (2007, p. 106) the same objection is made in Russia about the attempts to create any kind of binding precedent rule in that country.

¹⁸⁴ Elliott, Catherine and Quinn, Frances. *English Legal System* (12th ed, Harlow/England, Longman/Pearson Educated, 2011), p. 12.

¹⁸⁵ These ways to avoid undesirable precedents are of a considerable number. The cited authors

Secondly, this minority resistant view in Brazil has an inconceivable lack of pragmatism, because, in favour of a mythologically free persuasion of the judge, it wastes all the advantages of the doctrine of binding precedent. It is romantic, unreal and, above all, contrary to the public interest.¹⁸⁶ Taking as an example the issue of the judicial review of legislation, which in Brazil aggregates both the centralised and decentralised models, a strong dispute between them has been experienced for many years. The multiplicity of cases with different decisions, in areas such as social security, tax or administrative law but also related to constitutional law, requires the adoption of efficient mechanisms in order to uniformify this disconnected case law. The adoption of a doctrine of *stare decisis* in Brazil (specifically the adoption of the Supreme Court's Binding *Súmula*) – the majority opinion agrees – is not intended to undermine the role of the lower courts; what is desired is a reinforcement of the role of the highest national court in order to have rapid decisions and, above all, a uniformed case law.

An excerpt of the opinion of Justice Francisco Rezek in Declaratory Action of Constitutionality 1/DF illustrates well what this issue means to the Supreme Court:

There was a time – older members of this Court remember – in which a certain Appellate Court, in a prestigious unit of the Federation, chronically and clearly defied the Supreme Court's case law (by the way, a minor theme: the representation of the offended woman in crime against the customs). The

were careful enough to list them and they can be, to a proper degree and with proper adaptations, applied to the Brazilian law: (i) by distinguishing the awkward precedent on its facts – arguing that the facts of the case under consideration are different in some important way from those of the previous case, and therefore the rule laid down does not apply to them. Since the facts are unlikely to be identical, this is the simplest way to avoid an awkward precedent, and the courts have made some extremely narrow distinctions in this way; (ii) by distinguishing the point of law – arguing that the legal question answered by the precedent is not the same as that asked in the present case; (iii) by giving the precedent a very narrow *ratio decidendi*. The only part of a decision that forms binding precedent is the *ratio*, the legal principle on which the decision is based. Since judges never state 'this is the *ratio decidendi*', it is possible to argue at some length about which parts of the judgment actually form the *ratio* and therefore bind the courts in later cases. Judges who wish to avoid an awkward precedent may reason that those parts of the judgment which seem to apply to their case are not part of the *ratio*, and are only *obiter dicta*, which they are not obliged to follow; (iv) by arguing that the precedent has no clear *ratio decidendi*. There are usually three judges sitting in Court of Appeal cases, and five in the Supreme Court. Where each judge in the former case has given a different reason for coming to the same decision, or where, for example, two judges of the Supreme Court take one view, two more another, and the fifth agrees with none of them, it can be argued that there is no one clear *ratio decidendi* for the decision; (v) by claiming that the precedent is inconsistent with a later decision of a higher court, and has been overruled by implication; (vi) by stating that the previous decision was made *per incuriam*, meaning that the court failed to consider some relevant statute or precedent; (vii) by arguing that the precedent is outdated, and no longer current with modern thinking. See Elliott and Quinn (2011, p. 12).

¹⁸⁶ See Wambier (2012, p. 27) and Santos (2012, pp. 185-194).

Supreme Court had a firm, constant and unanimous position about it, and this Appellate Court, because it thought about it differently, used to decide on the terms of its own conviction, alleging the so-called “freedom of persuasion”, proper to every judge and court. The result: all those decisions were, through an extraordinary appeal, reversed by this court. That thing that should end in its origin, according to the Supreme Court’s case law, it only ended here, after a lamentable expenditure of financial resources, time and energy in a judiciary that is already congested and with a minimum time to take care of new things. And when did it happen that the Supreme Court’s case law failed and the rebellious court’s decision found its glory moment? When the defendant, because he was assisted by a negligent lawyer or he was lacking in other means, did not appeal. Only in this circumstance the unfortunate defiance of the Supreme Court worked. With all due respect, I do not see any beauty in this. On the contrary, it seems an immoral situation to which the judicial consciousness should not give in at all.¹⁸⁷

Thirdly, it can be said that the constitutional principle of the rational persuasion of the judge or freedom to interpret law, although it is very important, must be reconciled with the principle of equality of all before the law, which is also encapsulated in the Brazilian Constitution of 1988. Every time diverging judicial decisions are applied to similar cases, this being a fruit of an almost religious embrace of a judge’s freedom of persuasion, the constitutional principle of equality before the law, in its contents, is seriously attacked. In other words, the constitutional expression contained in the Brazilian Constitution’s article 5º, *caput*, will remain as an empty formula unless the courts reconcile both principles; and to have this reconciliation, it is necessary to ascertain the non-destruction of any of them.^{188,189}

It is important to make it clear that the establishment of a more comprehensive approach to binding precedent in Brazil (in the case of the Supreme Court’s Binding *Súmula*) does not signify imposing ties to lower courts and judges so

¹⁸⁷ *Ação Declaratória de Constitucionalidade – ADC-QO 1/DF – STF – Full Bench – Rapporteur Justice Moreira Alves – j. 27-10-1993 – DJ 16-6-1995 – LEX/JSTF, n. 214, pp. 52-53.*

¹⁸⁸ Tassara comments on the tension the famous “judges’ independence”, which would not be so real, in quite interesting way. According to him, judgements are inevitably linked with prejudices. This implies a peculiar dependence of the judge: of himself and of everything that makes up its interpretive horizon. This dependence of the judge of his own environment, together with openness of the statutory language, in part explains the plurality of interpretation that different judges end up producing. Precedents will help to reduce this kind “dependence”. Binding the judges to precedents is to oblige them to control their prejudices by dialoguing with the reasoning of their peers. This will increase the external dimension of the judge’s independence, because nothing ruins more the confidence in justice than the appearance of arbitrariness (‘independence’ without control) in those in charge of realizing it. See Tassara, Andrés Ollero. *Igualdad en la aplicación de la ley y precedente judicial* (Serie Cuadernos e Debates, Madrid, Centro de Estudios Constitucionales, 1989), pp. 83-84.

¹⁸⁹ The question of precedents and equality will be developed further in Chapter 6.

there are no possibilities for them to see the law in a new way when the understanding that is bindingly adopted shows signs that is outdated under inevitable social changes. What is proposed is a formula for preventing the litigants' fortune from depending on the frequent changes in the composition of the courts and the changes in the understanding that comes from this (which is very common in Brazil nowadays), depending on the mere distribution of the case to judicial body X or Y or, which may be seen as being even worse, depending on the vanity or the stubbornness of the judge of the case.

Finally, to tell the truth, in strict terms there is no violation of the freedom of persuasion of judges in Brazil with the adoption of a rule of *stare decisis*.¹⁹⁰ Actually, in Brazil, as will be discussed in Chapter 4, even after the Federal Supreme Court states a certain understanding in an “*Ação Direta de Inconstitucionalidade*” or in an “*Ação Declaratória de Constitucionalidade*”¹⁹¹, for instance, nothing prevents judges or lower courts, although it is not very practical, from adopting a contrary position to the Supreme Court (the same is to happen with Binding *Súmula*, as will be seen in Chapter 5). Against the disobedient decision, there are no disciplinary sanctions. As will be seen later, the consequence of this is simply to allow a “*Reclamação*” to the Supreme Court in order provoke it to restore the authority of its own binding decision.

Nery da Silveira, a former Justice of the Supreme Court, in *obiter dicta* of his opinion in Declaratory Action of Constitutionality 4/DF, confirms this point of view:

I also make it clear that, in my point of view, our judicial system does not authorise the coercion of the judge's activity. If, by chance, magistrates have a different understanding from the Federal Supreme Court, I am not preventing them from deciding according to their conscience. To ensure the magistrate's independence to every degree is part of our best judicial tradition. The Supreme Court is the top of the system, but any magistrate of this Nation must have the power to decide independently. I am sure, however, that, once the preliminary injunction is granted, with a binding effect, from that moment on, no judge, in cases in which that norm would be applicable, can refuse to follow it, for a question of logic, because the magistrate knows that, if he does so, he will be harming the party, who will then be compelled to come to the Supreme Court and, presenting a complaint [“*Reclamação*”], demand the cassation of the lower court's decision, for ignoring this Court. However, I emphasize that the judge will take no risk of a disciplinary sanction

¹⁹⁰ See Silva (2010, pp. 169-170).

¹⁹¹ As will be seen in Chapter 4, the two most important direct actions in the concentrated judicial review of legislation in Brazil.

if he always decides, justifiably, according to his conscience and independence.¹⁹²

2.6.4 Binding Precedents in Brazil: a First Systematisation

As previously seen, a precedent is relatively binding when the court has the power to depart from it once there are good reasons to do so. The proposition encapsulated in the (supposedly) binding precedent is so incorrect that it must be, in the interest of justice, avoided. The absolutely binding precedent is one that must be followed, even though the judge or the court considers it incorrect or irrational.

However, in Brazil, the classification of precedents as persuasive, relatively binding or absolutely binding, concerning the concrete case that is being decided, depends on extrinsic factors, such as the hierarchy between the courts of the precedent and the case in trial. The force of a precedent can vary under these different circumstances and cannot be considered as part of its internal attributes. Indeed, in Brazil the same previous decision can simultaneously be binding upon one court and merely persuasive for another, considering, for instance, the rank of the court that laid it down and its relation to the court that actually applies this precedent. To put it another way, the classification, in persuasive or binding precedents is specifically valid for the case that is actually being decided. Thus, some authors¹⁹³ tend to disregard the utility of the subdivision of binding precedent as being relative and absolute, recognising only the existence of two types of precedents: persuasive and binding (or the “true” precedent, meaning that only binding precedents are considered as precedents in the proper sense).

As it is necessary to define the Brazilian classification about the persuasiveness and bindingness of precedents, this graduation between absolute and relative binding precedents will be not used, but only the classification between binding precedents and persuasive precedents throughout this thesis (sometimes considering the case that is being decided).¹⁹⁴

¹⁹² *Ação Declaratória de Constitucionalidade – ADC-MC 4/DF – STF – Full Bench – Rapporteur Justice Sydney Sanches – j. 11-2-1998 – DJ 21-5-1999 – EMENT 1951-1 – RTJ 169 pp. 432-433.*

¹⁹³ These authors include Martin (1999, p. 22), Sesma (1995, p. 38) and Farnsworth, E. Allan. *An Introduction to the Legal System of the United States* (3rd ed, New York, Oceana Publications, 1996), p. 52.

¹⁹⁴ It is important to note that there are in Brazil those who classify the precedents into three different categories with regards to their authority. For instance, Bustamante (2007, pp. 260-261 and 335)

Finally, in Brazil, taking into consideration the term “precedent” in a broader sense, there are some examples of precedents that are formally and aprioristically binding and are supposed to be followed in every subsequent case. There are, for instance, the decisions of the Federal Supreme Court, in the centralised judicial review of legislation, concerning the constitutionality or unconstitutionality of statutory provisions. Either the Federal Supreme Court considers the legislation constitutional or unconstitutional, the others courts and the Executive bodies must bindingly apply the Supreme Courts’ understanding.¹⁹⁵ The new Supreme Court’s Binding *Súmula* can also be cited as a good example of this. These binding precedents *lato sensu* shall be fully addressed in Chapters 4 and 5.

2.6.5 The New Bindingness of the Federal Supreme Court Decisions in the Context of the Decentralised (“*Difuso*”) Judicial Review of Legislation

Recently, the Federal Supreme Court has taken an important step towards a wider adoption of the idea of *stare decisis* in Brazil. Historically, the Supreme Court decisions in the context of the decentralised¹⁹⁶ judicial review of legislation (commonly in concrete cases via extraordinary appeal), which declare the unconstitutionality of a legislative provision, are considered mere persuasive precedents. Actually, according to article 52, X, of the Federal Constitution, these decisions of the Supreme Court require a further interference of the Federal Senate, which should pass a resolution, in order to give *erga omnes* and binding effectiveness to the declaration of unconstitutionality. However, mirroring the

states that precedents are: (i) formally binding; (ii) not formally binding but having force (iii); mere persuasive.

¹⁹⁵ To illustrate this, it is different in Italy, for instance, where only the decision of the Constitutional Court that finds a statutory rule is contrary to a constitutional provision, and therefore the court declares that such a rule is “unconstitutional”, must be bindingly followed. In Italy, as Taruffo and La Torre (1997, p. 155) state, “it should be stressed, however, that such a judgment is not a precedent in the proper sense: rather, it has the same effect as an abrogation, since after it the statutory rule involved is no longer deemed to “exist” in the legal system. This is the reason why the judgement cannot be overruled and must be applied in every case. But this is not “force of precedent” in proper sense. Consider, moreover, that when the Constitutional Court finds that a statutory rule is not in conflict with a constitutional provision, such a judgment has no special effect. It may be overruled by the same court, and it is not formally binding, but it is a *de facto* precedent”.

¹⁹⁶ That is entrusted, as in the American model, to all Brazilian judges and courts. The decentralised model, as Cappelletti states, “had its origin in the United States, where judicial review remains a most characteristic and unique institution”. See Cappelletti, Mauro. *The Judicial Process in Comparative Perspective* (Oxford, Clarendon Press, 1989), p. 133

legislative changes that the legal system has suffered (above all the determinations of Law 9882/1999, related to the centralised judicial review of legislation, and the creation of the Binding *Súmula* by the new article 103-A of the Brazilian Federal Constitution, regulated by Law 11417/2006), the Supreme Court is likely to change this understanding about the authority of these decisions in the decentralised review. Indeed, in some recent cases, the court has stated that its decisions, even those taken in the decentralised review in concrete cases, must bind all other courts when they deal with the same legal/constitutional issue. In other words, these precedents in strict sense (or their rationale) shall be taken as the reference point by the lower courts, concerning the issue of constitutionality or unconstitutionality of the legislation, in case of these courts have to decide concrete cases connected with this issue.¹⁹⁷

The leading case for this case law overruling was *Reclamação* 4335/AC¹⁹⁸, where the Supreme Court explicitly started to change its quasi-secular understanding that its decisions in the decentralised control of constitutionality had only *inter partes* effects and persuasive authority in further cases.

The *Reclamação* 4335/AC was filed by the Public Defence Service of the State of Acre against a decision of one of the criminal courts of the capital of the State (Rio Branco city), responsible for execution and supervision of criminal sentences of convicted felons while serving time. This criminal court had dismissed applications in favour of several convicts, who were serving sentences of fully imprisonment for hideous crimes, for a progression to a regime of less severe conditions. The *Reclamação* alleged that the criminal court of the state of Acre, while dismissing the progression of the regime of those condemned for hideous crimes simply based on prohibition of this progression by the § 1º of article 2º of Law 8072/1990 (Law of Hideous Crimes), had disobeyed the previous decision of the Supreme Court in *Habeas Corpus* 82959/SP¹⁹⁹, which had considered that legislative provision unconstitutional.

¹⁹⁷ See Souza, Marcelo Alves Dias de. *Retratos ingleses* (Natal, Feedback, 2012), pp. 177-180.

¹⁹⁸ *Reclamação* – Rcl 4335/AC – STF – *Rapporteur Justice* Gilmar Mendes – j. 21-8-2006 – DJ 25-8-2006, p. 76.

¹⁹⁹ *Habeas Corpus* – HC 82959/SP – STF – Full Bench – *Rapporteur Justice* Marco Aurélio – j. 23-2-2006 – DJ 1-9-2006 p. 18.

In his opinion, Justice Gilmar Mendes (the *rapporteur* of the decision and a former Chief Justice of the Supreme Court) stated that, according to the traditional understanding, the suspension of the legislation, previously declared unconstitutional by the Supreme Court in the decentralised and concrete judicial review, by the Federal Senate is the political act that lends *erga omnes* effectiveness to that declaration. He asserted, however, that the amplitude given to the abstract control of norms after the promulgation of the Federal Constitution of 1988, above all the advent of Law 9882/1999, has contributed to undermining the belief in the correctness of the necessity of this posterior suspension of the legislation by the Senate, which is clearly inspired by a concept of separation of powers that today would be surpassed. The *rapporteur* considered that the Federal Constitution of 1988 itself and the Law 9882/1999 had radically changed the concept of the separation of powers in Brazil, becoming much more common in the legal system decisions, in judicial review of legislation, with overall and binding effectiveness than it was under the previous constitutions. He also stressed that reinterpretations of the categories linked to the decentralised judicial review of legislation, notably the requirement of an absolute majority for the declaration of unconstitutionality and the suspension of enforcement of the law declared unconstitutional only by resolution of the Senate, are inevitable. The line of argument of Justice Gilmar Mendes was that the constitutional provision – which states that the *erga omnes* effectiveness of the declaration of unconstitutionality issued by the Supreme Court in the decentralised judicial review depends on a further deliberation of the Senate (introduced in Brazil by the Constitution of 1934 and preserved by the Constitution of 1988) – has lost much of its meaning with the parallel model of abstract judicial control of legislation. He considered the “interference” of the Senate as a simple way of giving general publicity to the Supreme Court’s decision, which was perfectly supplied by the publication of the decision in the official press which delivered all Supreme Court decisions.^{200,201}

²⁰⁰ This new understanding of the Federal Supreme Court has gained support among scholars. Those supporting it include the following: Didier Jr., Freddie et al. *Curso de direito processual civil: execução* (Salvador, Jus PODIVM, 2009), p. 373.

²⁰¹ However, there are those *in contra*, who argue that this new understanding not only changes the established model of diffuse control of constitutionality, but also diminishes the role of the parliamentary constituent power and alters the balance between the powers of the Republic in Brazil. For instance, see Streck, Lenio Luiz et al. A nova perspectiva do Supremo Tribunal Federal sobre o controle difuso: mutação constitucional e limites da legitimidade da jurisdição constitucional. *Jus*

The new understanding led by the (former) Chief Justice concerning article 52, X, of the Federal Constitution is a clear case of constitutional mutation, where the Supreme Court, more than exercising the power of interpreting and extracting a rule of the constitutional text, self-recognised the power to change the constitutional text in comment.²⁰²

In his opinion in *Reclamação* 4335/AC, Justice Gilmar Mendes, considering dispensable the intervention of the Federal Senate, concluded that the decisions taken by the criminal court of the state of Acre had disregard the *erga omnes* and binding effectiveness of the Supreme Court's decision (precisely, its rationale) in the *Habeas Corpus* 82959/SP (a case of concrete and decentralised judicial review of legislation). He upheld the *Reclamação* (the preventive measure) and annulled these contested decisions. He also determined that the criminal court in the state of Acre to deliver – considering that the § 1º of article 2º of Law 8072/1990, which had prohibited the progression of the regime of those convicts for committing heinous crimes, was considered unconstitutional (the rationale of the precedent *Habeas Corpus* 82959/SP) – new decisions assessing, in each concrete case, whether those interested in the progression do or do not meet the general legal requirements to enjoy the benefit.²⁰³

Furthermore, in what is currently called in Brazil the “objectivation” of the decentralised judicial review of legislation performed by the Supreme Court²⁰⁴, this understanding, which gives *erga omnes* and binding effectiveness to decisions taken in this control, has been applied in other cases.^{205,206} According to the Informative

Navigandi, Teresina, ano 12, n. 1498, 8 ago. 2007. <<http://jus.uol.com.br/revista/texto/10253>> accessed 17 July 2011.

²⁰² See Tavares (2007, pp. 86-90) and Leite, Glauco Salomão. *Súmula vinculante e jurisdição constitucional brasileira* (Rio de Janeiro, Forense, 2007), pp. 103-104.

²⁰³ Although the preventive measure had been given by the *rapporteur*, the trial is not yet finished. Continuing the trial, there has been one more vote upholding the *Reclamação* and two votes that, although dismiss the *Reclamação*, has granted a *Habeas Corpus ex officio* in favour of the convicts, based on similar arguments and with same effects. The trial will soon continue with the votes of the other seven justices.

²⁰⁴ As it will be seen in Chapter 5, this “objectivation” of the diffuse judicial review of legislation has gained a great impulse with the creation of the Binding *Súmula* by the new article 103-A of the Brazilian Federal Constitution. Also sustaining this convergence between the concentrated and diffuse models of judicial review of legislation in Brazil, see Leite (2007, pp. 13 and 21), Tavares (2007, pp. 69-72) and Monnerat, Fábio Victor da Fonte. A jurisprudência uniformizada como estratégia de aceleração do procedimento. In Wambier, Teresa Arruda Alvim (coord). *Direito jurisprudencial* (São Paulo, RT, 2012), pp. 385-390.

²⁰⁵ Recognising this “objectivation” of the diffuse judicial review of legislation performed by the

455 of the Federal Supreme Court, the Court upheld, in a trial “en bloc”, 4908 extraordinary appeals filed by the National Service of Social Security in which were discussed whether Law 9032/1995 should be applied to retirement pensions and death pensions granted before that this law had come to force. Initially, the Court, by majority, emphasizing the homogeneity of the issue dealt in the cases in trial and paying homage to what article 5º, LXXVIII, of the Federal Constitution states (the resolution of judicial disputes within a reasonable time), decided to continue the trial of all 4908 extraordinary appeals en bloc. With respect to its merits, the Court unanimously applied the guidance reached in the decisions of two previous similar extraordinary appeals. Invoking once more the fundamental right to a quick procedure, it gave binding effect to these two precedents, this time using the additional advantage of the novel possibility of a judgment en bloc.

To summarise, this chapter has presented part of the traditional (essentially civil law) approach to precedents in Brazil in order to compare it to England. Having fulfilled in this chapter the purpose of addressing the role of precedents in the formulation of the law in Brazil and systematising concepts (such as creativeness/declarativeness and persuasiveness/bindingness of precedents) and terms, the following chapter will analyse the practical uses of precedents in Brazil still under a traditional civil law perspective and then compare them to the English model.

Supreme Court as an irreversible trend, see Marinoni (2010b, p. 82).

²⁰⁶ In contra, see Camargo, Luiz Henrique Volpe. A força dos precedentes no moderno processo civil brasileiro. In Wambier, Teresa Arruda Alvim (coord). *Direito jurisprudencial* (São Paulo, RT, 2012), pp. 633-643.

3 Dealing with Precedents in Brazil

3.1 General Considerations

This chapter will discuss how judges in Brazil, while still operating under a civil law perspective, in practice deal with precedents. The issues that will be dealt with in this chapter include the way Brazilian judges evaluate old and new precedents; how Brazilian judges discriminate – if they do so – *ratio decidendi* and *obiter dicta*; how they deal with seemingly relevant precedents; why Brazilian judges so frequently depart from precedents; how they deal with the issue of prospective overruling; and how precedents are reported in Brazil.

In Brazil, precedents have been models for future decisions²⁰⁷, but because of the function that the system historically attributes to them – a persuasive force, generally – they formally tend to play a secondary role when compared with the legislated norms.^{208,209} Based on the civil law tradition, the approach to precedents in Brazil can be summarised as follows: (i) the key to the system is that the lower courts do not have to follow the previous decisions of the superior courts; (ii) courts and judges do not have to follow precedents of courts and judges at the same hierarchical level. Thus, if a court or a judge is called upon to decide a case and finds that there is a precedent of a court at the same level, they are not bound to maintain the same approach; (iii) courts and judges do not have to follow what they have already decided themselves. The fact that a specific court has always decided, in a particular way, a category of cases, does not forbid it, in any given moment, from adopting another direction that seems to it (the court) more appropriate.^{210,211}

²⁰⁷ Certainly, in Brazil, the law of least effort frequently leads the judge to rule a later case in an equal manner that has been already ruled on in a previous similar case. A first precedent is similar to an open trail in an unexplored jungle, a clearing that calls for passage. If those who follow the clearing find the goal which is sought, the road will become frequented and, over time, truly safe. Besides, from a philosophical point of view, the ideal of “equal justice for all” impels the judge to follow the precedent. Finally, the prohibition of the Justinian Code, that the judge must not decide according to precedents (*non exemplis, sed legibus indicandum est*), is truly impracticable, especially since the judge may use the arguments of a previous decision without referring expressly to it. See Sampaio, Nelson de Sousa. O Supremo Tribunal Federal e a nova fisionomia do judiciário. *Revista do Direito Público*, n. 75, jul/set 1985b, p. 09.

²⁰⁸ See Nobre Júnior (2000a, p. 148).

²⁰⁹ See also Souza (2006, p. 176).

²¹⁰ See Ascensão, J. Oliveira. *O direito: introdução e teoria geral: uma perspectiva luso-brasileira* (Rio

Besides, considering how judges and courts present²¹² and ground their decisions, precedents have been manipulated in different ways in Brazil. Some have been content to rely on authority found in the codes or statutes, only superficially considering the pertinent precedents. Others have gone deeper, carefully reasoning on precedents, examining each issue as considered by other courts and judges.²¹³

However, as already said, the last decades in Brazil have seen a clear increase in the use of precedents in the terms of frequency and creativity. Increasingly, precedents are used as one of the main grounds for most judicial decisions. Currently, courts' and judges' decisions rather infrequently refer only to the Constitution or the relevant statutes, and precedents are quoted even when the legal issue is "covered" by legislative provisions. Very frequently the statutory provisions are addressed, analysed and interpreted by means of the discussion of related precedents, and they gain persuasive force when they are embodied in one or several precedents. In these cases, the use of precedents has been a sort of medium for the reference to the legislation and not an alternative to it.

Certainly, the way judges in Brazil apply precedents does not correspond to the common law experience, but, on the other hand, it is not a simple mechanical activity, in which the Brazilian judge has a passive position of verifying if some court (particularly a higher court) has already pronounced on the matter and, if persuaded, decides in the same way. Although some law professionals, educated under a Roman-German tradition, can think that this is the manner of applying precedents to

de Janeiro, Renovar, 1994), p. 247.

²¹¹ This is the common approach to the issue in any civil law country. Concerning France, for instance, Steiner (2006, p. 80) says: "Apart from the two above instances, the law regarding precedent in France may be summarized in the five following points: 1. Precedents do not need to be followed in subsequent similar cases. This rule applies not only to the court giving the decision but also to any other courts. 2. As a consequence, even the highest courts – Court of Cassation and Conseil d'Etat – are not bound by their own previous decision. 3. And similarly, lower courts are also not bound by the decision of superior courts. (...)"

²¹² Although currently there is a generally accepted model, judges have written their decisions in many different styles. For instance, some judges are naturally verbose; others, terse, while the quality of reasoning also varies widely. At present, the most accepted model of a decision requires three parts: (i) the first of these states the history of the case, with a narrative of facts and issues to be decided; (ii) secondly, the resolution of those issues and an explanation of why those issues were so resolved; (iii) lastly, the provision of the decision. Once past that outline, styles vary widely.

²¹³ In Brazil, there is no prohibition, as Steiner (2006, p. 80) points out there be in France, to "explicit reference by a court to its own *jurisprudence* when given a decision and, more generally, citation of a previous case (...) when these are meant to serve as a legal basis for the court's decision".

concrete cases²¹⁴, this extremely simplistic and distorted view does not correspond to reality in Brazil. This reality is much more complex.

To understand how judges deal with precedents in Brazil it is necessary to have some previous understanding of many legal concepts related to the doctrine of *stare decisis* and how to manipulate them. It is fundamental, for instance, to understand how Brazilian courts evaluate precedents. It is necessary to understand the concepts of *ratio decidendi* and *obiter dicta* as they are characterized in Brazil. Besides, in comparing both the precedent and the case to be decided, it is imperative to be aware (and recognise if it is the case) of the possibility of distinguishing and overruling to an accurate application of the precedent. It is essential to address the issue of prospective overruling in Brazil. Finally, it is necessary to emphasise the role that law reporting plays in the way case law grows under the Brazilian legal system.

Once again, in order to provide a useful Anglo-Brazilian comparison, it will be necessary to deal with many concepts and terms of the common law doctrine of *stare decisis*, which are not familiar in the Brazilian law vocabulary. Certainly, it is difficult to transplant these concepts and terms to Brazilian law by means of simply reading and writing them, while adding that, even in common law countries, they are very controversial subjects. The reverse is also true: it will be imperative to deal with many concepts and terms of Brazilian law and it is not an easy task to present them to an English audience. However, a meaningful comparison is not impossible. In order to fulfil this purpose, this chapter will always cross-culturally debate the concepts, techniques and the respective vocabulary of the doctrine of *stare decisis*. Based on this, the Brazilian traditional way of dealing with precedents will be critically presented.

3.2 Evaluating Precedents

Brazilian courts and judges have developed their own way of evaluating persuasive precedents. Although there is no formal categorization of these precedents according to the degree of influence or prestige, the following considerations can summarise how Brazilian courts and judges in general have

²¹⁴ See Ascensão (1975, pp. 17-18).

evaluated precedents – or what criteria they have given priority to – in order to follow them or their supporting arguments.

First of all, it is imperative to recall that the use of precedents to ground later decisions in Brazil is more frequent and decisive in some branches of law than in others. If a certain field of the law is only partially regulated by legislative provisions, such as in the cases of administrative and social security law, which are not codified in Brazil, precedents play a more significant role. In these cases, courts and judges tend to rely on precedents and these areas in Brazilian law have been considerably developed by case law. Besides, significant importance can be perceived among the uses of precedents in constitutional, electoral, labour and tax law, possibly due to the fact that cases in these areas deal predominantly with questions of law while in others areas, such as criminal law, judges have to mainly focus on the issues of fact.

Another peculiarity that is noted in the use of precedents by Brazilian courts is linked to the different levels of the judicial structure. Lower courts and judges often devote their attention to the issues of fact and, consequently, in cases before them, the use of precedents, commonly being limited to the decision of the issues of law, seems to be less decisive. On the other hand, since higher courts – specially, the Supreme Court and the Superior Courts – deal mainly with issues of law, precedents play an important role in the rationale of their judgments.

Apart from this, the proper soundness of the supporting arguments in the previous decision has been of great importance for the decision of subsequent cases. It can be said that, frequently, the soundness (or the high persuasiveness) of the arguments is the main reason for following a precedent. In particular, the soundness is especially relevant when a very new precedent is considered as suitable for following, when a precedent (generally, an older one) is debated on in order to decide whether to overrule it or not, or when there are conflicting precedents.

The hierarchical rank of the court the pronounced the decision is also certainly another important factor in the process of evaluating a precedent. Although lower courts, as a rule, are not formally bound to apply, they are expected to carefully consider precedents of the higher courts. Precedents of courts belonging to the same rank are regarded as less effective than precedents of higher courts. Previous decisions of lower courts are regarded as being not very persuasive and, when a decision of a lower court is quoted in a higher court decision, it is an example rather

than an influential precedent. It can be said that the decisions of the Federal Supreme Court (even those that are not considered formally binding) and the decisions of the four Superior Courts are considered stronger than those of other courts (for example, appellate courts and trial judges). A precedent of a court of appeal is deemed very persuasive by trial judges when the precedent is of the same appellate court that would review the judgment on appeal. Finally, courts have a factual tendency to follow their own previous decisions more strictly than precedents of other courts of same hierarchy.

The reputation of the court – that is, the conservatism or progressiveness of the court concerning certain agenda, the quality of its previous decisions, the authoritativeness of the court or the panel on given matters, the acknowledged independence of its judges, among others factors – also plays an important role in determining the influence of the decision. As for the Brazilian law, as a matter of principle, the judges' prestige is something that is difficult to evaluate because, in theory, all judges of a court have the same status. However, since in collegiate courts it is always made public which judge wrote the opinion, in practice, the decisions of (or written by) some judges are more respectfully considered than the decisions of others.²¹⁵

A decision of a court is also viewed as being more influential when it has been pronounced by (one of the following) the full bench, the special court (in the Superior Court of Justice, for instance) or a criminal or civil section than when it has been delivered by a small panel or a single judge (on behalf of the court). Indeed, sometimes, the Supreme Court, when dealing with especially important issues and is expected to deliver a decision that could influence subsequent cases, rather prefers – and it has regimental permission to do so – to decide in full bench than by a panel or by a single Justice on behalf of the court.

The quorum of the decision is also a relevant factor in the process of evaluation. In Brazil, if there are one or more dissenting opinions, it is always stated in the decision, and the dissenting opinions are commonly published together with the majority opinion. If this is not the case, the decision is labelled as unanimous. Therefore, the presence or absence of dissent might influence the weight given to

²¹⁵ This is also said to be true with the English law, for instance. In England, during the last century, among the most prestigious judges were Lord Scrutton, Lord Atkin, Lord Wright, Lord Reid and Lord Radcliffe. See Sesma (1995, p. 46).

the precedent. As Tucci remembers, dissenting opinions, which have the nature of *dicta*, in some situations end up highlighting the cracks in the paradigm of the prevalent understanding and, in some way, indicate a possible change in the assessment of similar questions later.²¹⁶

A characteristic that also deserves close attention is the special manner of evaluating old and new precedents in Brazil in comparison to the English approach. In countries related to the tradition of common law – and taking England for example – a precedent never loses its strength with the simple passage of time. Since it is still relevant in principle, it maintains its authority. The fact is, in England, the older the precedent the more valuable it is, as it is gradually illustrated and reinforced by later decisions that have preserved and updated it. Repeatedly interpreted and applied, it also reflects the wisdom of the various courts, as knowledge that transcends fleeting moments. Furthermore, a coherent line of precedents represents not only the experiences of several judges, but also their different talents and expertise, enabling them to engage with their peers both from the past and the present. A longstanding precedent, if preserved, proves to be the most precious material that has survived the test of time.^{217,218}

Conversely, in Brazil, old precedents commonly lose their strength with the passage of time and the newest precedent is always the most sought after and the most valued. Law professionals are aprioristically looking for the Supreme Court's most recent (preferably from the same year) point of view about the issue.²¹⁹ Since their time as law students, they are strongly recommended to not rely on old precedents, as these precedents frequently no longer represent the current court's understanding about the researched issue.²²⁰ In truth, old precedents tend to be considered with caution because in general case law in Brazil is not reliable. Given

²¹⁶ Tucci, José Rogério Cruz. *Precedente judicial como fonte do direito* (São Paulo, RT, 2004), p. 178.

²¹⁷ Like a fine wine that needs to be guarded, a good precedent, to be so recognised, must be tested by “*Le temps, ce grand sculpteur*”, to use here the beautiful title of Marguerite Yourcenar's book (Paris, Editions Gallimard, 1983).

²¹⁸ Many of the fundamental principles of English common law, such as individual liberty, freedom of contract and freedom of competition, depend considerably on older precedents. Most of these ancient principles were interpreted and developed in subsequent decisions and found their climax in a modern decision of the House of Lords (now replaced by Supreme Court of the United Kingdom) and, in such cases, the newer decisions refer to the original precedent.

²¹⁹ See Souza (2006, p. 314).

²²⁰ See Souza (2006, pp. 298-299)

the absence of a general rule of binding precedents that assures uniformity and stability, the Brazilian case law is very changeable. It is common, within a short lapse of time, for minor or even radical changes to be made in the case law of any court concerning any issue. The main result is that a stable line of precedents is not preserved. Consequently, the more recent a precedent is, the more likely it is to be the real and current case law of the court, and this makes it more valuable.

Changes in the social, political and economic backgrounds, which are very common in Brazil, are also especially relevant in evaluating old and new precedents. Changes in these contexts are considered sufficient reasons not to apply old precedents. Such an argument is invoked daily by courts as a justification for not following an old precedent or even to set a new interpretation to it. On the other hand, a new precedent will be considered highly influential when it effectively reflects the new political, economic and social panorama.

Certainly, legislative changes in related areas since the prior decision took place are also considered highly relevant as the Brazilian legal system, historically linked with the civil law family, is primarily based on legislative provisions. An old precedent may be considered influential when the legal basis of the legal issue has not changed substantially, but they tend to be considered superseded or of no value at all when the legal basis of the issue that they deal with has changed.

3.3 *Ratio Decidendi* and *Obiter Dictum*

Under the common law tradition, rather than what many people in civil law countries believe to be true, the only part of a precedent which is binding is its *ratio decidendi* or reason for deciding.^{221,222,223} Thus, if a proposition that is part of the decision is not part of its *ratio decidendi*, it is, by definition, a *dictum* or *obiter dictum*,

²²¹ See Cross and Harris (2004, p. 39)

²²² The very same was stated by the Court of Appeal (in the words of Lord May) in *Ashville Investments Ltd v Elmer Contractors Ltd* [1988] 3 WLR 867: "In my opinion the doctrine of precedent only involves this: that when a case has been decided in a court it is only the legal principle or principles on which that court has so decided that bind courts of concurrent or lower jurisdictions and require them to follow and adopt them when they are relevant to the decision in later cases before those courts. The *ratio decidendi* of a prior case, the reason why it was decided as it was, is in my view only to be understood in this somewhat limited sense".

²²³ Although it is commonly stated by law professionals that the doctrine of *stare decisis* signifies that courts must follow the existent "precedents".

and, consequently, not binding.^{224,225} These *dicta*²²⁶ can be strongly persuasive and be followed, but are never binding.^{227,228,229}

If the categories of *ratio decidendi* and *obiter dictum* are fundamental to the theory of precedents under a common law perspective, the first task that a common lawyer must do when analysing a precedent is to try to identify what propositions really constitute its *ratio decidendi*, distinguishing from the mere *obiter dicta*.²³⁰

²²⁴ The most usual definitions of *dictum* and *obiter dictum* are obtained negatively, from determining what *ratio decidendi* of a case is. See Sola, Juan Vicente. *Control Judicial de Constitucionalidad* (Buenos Aires, Abeledo-Perrot, 2001), p. 218. It is also said that *dictum* is a proposition of law which, although it is not *ratio decidendi*, has a considerable relation to the matter of the judged case and greater power of persuasion. In comparison, *obiter dictum* is a proposition of law, part of a judgment, with a very tenuous link with the matter of the case and is not very persuasive. But the expressions *dictum* and *obiter dictum* are used indiscriminately by law professionals to encompass both meanings. Others terms also used are *gratis dictum* and *judicial dictum*. According to McLeod (2011, p. 143): “*Gratis dicta* are mere throwaways (sayings which are given away, as they were, free) and so of very little, if any, value or persuasive force. It is likely, therefore, that *gratis dicta* will not have been the product of much thought of the judge. *Judicial dicta*, on the other hand, will have been preceded, not only by a great deal of careful thought, but also by extensive argument on the point in question. In reality, therefore, *judicial dicta* may be so strongly persuasive as to be practically indistinguishable from *ratio*”.

²²⁵ In general terms, the definitions of *ratio decidendi* do not differ in Brazil. See Souza (2006, p. 126), Tucci (2004, p. 175) and Silva, Celso de Albuquerque. *Do efeito vinculante: sua legitimação e aplicação* (Rio de Janeiro, Editora Lumen Juris, 2005), p. 182. Concerning similar definitions of *obiter dictum*, see Souza (2006, pp. 139-140), Tucci (2004, p. 177) and Silva (2005, pp. 184-185).

²²⁶ It is the plural of *dictum*.

²²⁷ In the USA, Chief Justice Marshall, in *Cohens v. Virginia* 19 US 264, 399, 5 L.Ed. 257 (1821), said that a dictum “may be respected, but ought not to control the judgment in a subsequent suit when the very point is present for decision”.

²²⁸ According to Zander, “the most carefully considered and deliberate statement of law by all five Law Lords which is *dictum* cannot bind even the lowliest judge in the land. Technically, he is free to go his own way. In practice, of course, weighted *obiter* pronouncements from higher courts are likely to be followed and will certainly be given the greatest attention, but in strictest theory they are not binding”. The same author explains “this is the reason why technically the Court of Appeal is not bound by statements in the House of Lords [currently, the Supreme Court] and that the Court of Appeal should follow its own decisions. Such a statement cannot form part of the ratio of the House of Lords decision, since a case in the House of Lords does not require a decision as to the handling of precedents by the Court of Appeal and therefore anything said on the subject is necessarily *obiter*”. See Zander, Michael. *The Law-Making Process* (6th ed, Cambridge, Cambridge University Press, 2004), pp. 268-269.

²²⁹ As an example of a very persuasive *dictum*, *Hedley Byrne & co. Ltd v. Heller & Partners Ltd* [1963] 2 ALL ER 575 can be cited, a case dealing with torts. In this case, the House of Lords unanimously stated, although there was no obligation to decide the issue (so, as a *dictum*), that in principle there is responsibility, when, by negligence, a financial damage is caused to someone, but, for a *ratio decidendi* peculiar to the case, judged the lawsuit inadmissible²²⁹. Based upon this judgment, in a similar case, processed in a lower instance – *Anderson (W.B.) & Sons Ltd v. Rhodes* (1967) 2 ALL ER 850 – it was said that, when five members of the House of Lords, after close examination of the authorities, have all stated that a certain type of tort exist, a judge of first instance should proceed on the basis that it does exist, without pausing to embark on an investigation whether what was said was really necessary for the ultimate decision.

²³⁰ Under common law, the decision of what is the *ratio decidendi* of a precedent is not of the court that had pronounced it but of the court of the later case. Indeed, the court that establishes the

However, on many occasions, it is extremely complicated to reach a precise distinction between the *obiter dicta* and the *ratio decidendi* of a precedent. Indeed, according to Duxbury, “the distinction between *ratio decidendi* and *obiter dicta*, although important, is not easily made”.²³¹ The reality is that common law theorists have been unable to agree on a harmonious concept or a test for the individualisation of the *ratio decidendi*. Not coincidentally, this concept in the English Courts has been, as stated by Gottlieb, “unprincipled and inconsistent”.^{232,233,234}

At first sight, this challenging task is not considered a problem in Brazil. Indeed, as precedents are commonly persuasive, it is not considered in Brazil a court’s duty to indicate the *ratio decidendi* of a precedent in order to follow what is stated in it.

precedent does not expressly state what the *ratio decidendi* of its decision is and what are mere *obiter dicta*. It is the court in the later case that has the duty to interpret the precedent and to identify the binding or prescriptive *ratio decidendi* prescribed to future related cases, which must be obligatorily followed. According to McLeod (2011, pp. 133-135), this idea is linked with the descriptive and prescriptive senses of *ratio decidendi*. The descriptive sense of *ratio decidendi* highlights or relates to the “modus” that the judge of the precedent reached his conclusion. The prescriptive sense of *ratio decidendi* highlights or identifies the judicial proposition that, derived from the precedent, binds or obliges the decision of a later case. In other words, it identifies the proposition of law prescribed by the previous case to the future case and which, in this case, must be followed. Stone is another author who writes about the distinction between the use of the expression “*ratio decidendi* describing the process of reasoning by which a decision was reached (the ‘descriptive’ *ratio decidendi*), and that which identifies and delimits the reasoning which a later court is bound to follow (the ‘prescriptive’ or ‘binding’ *ratio decidendi*)”. See Stone, Julius. *The Ratio of the Ratio Decidendi* (1959) 22 *Modern Law Review* – MLR, pp. 597.

²³¹ See Duxbury (2008, p. 68).

²³² See Gottlieb, G. *The Logic of Choice: an Investigation of the Concepts of Rule and Rationality* (London, Allen & Unwin, 1968), p. 78.

²³³ See the famous and contradictory theories of Wambaugh, Oliphant and Goodhart in, respectively: Wambaugh, Eugene. *The Study of Cases* (2nd ed, Boston, [NIA], 1894); Oliphant, Herman. *A Return to Stare Decisis* (1928) 14 *American Bar Association Journal* – ABAJ, pp. 71-77; and Goodhart, Arthur L. *The Ratio Decidendi of a Case*. In *Jurisprudence in Action: a Pleader’s Anthology* (New York, Baker, Voorhis & Co. Inc., 1953), pp. 189-222.

²³⁴ See Lord Justice Robert Goff’s assertion in *Elliott v. C (A Minor)* (1983) 2 ALL ER 1005: “I feel (...) that I would be lacking in candour if I were to conceal my unhappiness about the conclusion which I feel compelled to reach. In my opinion, although of course the courts of this country are bound by the doctrine of precedent, sensibly interpreted, nevertheless it would be irresponsible for judges to act as automata, rigidly applying authorities without regard to consequences. Where, therefore, it appears at first sight that authority compels a judge to reach a conclusion which he senses to be unjust or inappropriate, he is, I consider, under a positive duty to examine the relevant authorities with scrupulous care to ascertain whether he can, within the limits imposed by the doctrine of precedent (always sensibly interpreted), legitimately interpret or qualify the principle expressed in the authorities to achieve the result which he perceives to be just or appropriate in the particular case. I do not disguise the fact that I have sought to perform this function in the present case”.

Evidently, precedents in Brazil have *rationes decidendi* and *obiter dicta*. The Superior Court of Justice's decision in Special Appeal 954.859²³⁵ gives us a good example how *ratio decidendi* and *obiter dictum* differ in Brazilian precedents.²³⁶ This decision dealt with the interpretation of article 457-J of the Brazilian Code of Civil Procedure, precisely the question whether this article requires, for the application of the fine it establishes, the personal notifying of the fined party. The court ended by stating that the fine has to have effect independently of the notification. The *rapporteur*, in his opinion, stated that some scholars see the need for a personal notification of the party: "They use the argument that it is not possible to assume that the decision published in the official press has come to the attention of the party, because those who follow these publications are only the lawyer, but the argument is unconvincing. First of all, there is no legal provision requiring such personal notification. Articles 236 and 237 of the mentioned Code are sufficiently clear in this regard. Secondly, the lawyer must be in permanent contact with the client. It is up to the lawyer to communicate to the client that there was a condemnation against him. Indeed, a good lawyer should forward to the formal notification, preventing the client to be able to perform what was determined by the decision". However, the *rapporteur* added that "if the lawyer negligently omits to inform the client to perform the decision and the fine applied, the lawyer must be responsible for such damage". It is important to note that the Superior Court of Justice was not judging the responsibility of the negligent lawyer, but only considering the need for the party to be notified for the application of the fine. Thus, the observation of the *rapporteur*, in the sense that the lawyer becomes responsible for the fine if he does not inform his client on the decision, was a clear *obiter dictum*. It was an *en passant* argument, completely separated from the question that was being decided and unnecessary to arrive at the conclusion of the decision. This observation, that the negligent lawyer is indirectly responsible for a fine of article 475-J of the Brazilian Civil Procedure Code, can never be considered as the *ratio decidendi* of the precedent.

However, these categories do not have to be duly distinguished to verify which is to be followed or not. If the grounds for this in England is that the judges'

²³⁵ *Recurso Especial* – REsp 954859/RS – STJ – 3rd Panel – *Rapporteur* Justice Humberto Gomes de Barros – j. 16-8-2007 – DJ 27-8-2007 p. 252.

²³⁶ Marinoni (2010b, pp. 282-283) also mention this decision as an example of *obiter dictum* in Brazilian law.

power to interpret the precedent has its limits in the doctrine of *stare decisis* itself, which imposes obedience only to the *ratio decidendi* of the precedent, in Brazil, as the courts are not bound by the doctrine, the judges can freely interpret the precedent to reach a principle – independently of its characterisation as *ratio decidendi* or *obiter dictum* – which they feel to be just or appropriate to apply to their decisions. In other words, the later court, if dealing with a persuasive precedent, is entitled to interpret this precedent to freely extract the doctrine which will then be persuasively followed.

Certainly, judges in Brazil must examine the precedent with scrupulous care to ascertain whether they can legitimately apply the statements expressed in it. They must achieve a coherent and just reasoning that can be appropriate to the case in trial. But everything that was stated in the previous decision, even what is only *obiter dictum*, can be evaluated and cited as a motivation or principle in the later court's decision.

By not distinguishing *ratio* and *dicta*, Brazilian courts can also avoid difficult situations. For instance, the hypotheses of a decision which have several *rationes decidendi* instead of only one, is one of the biggest problems of the determination of the *ratio decidendi* of a precedent in English courts. It may happen when the court as a whole presents more than one reason as being fundamental for its decision.²³⁷ It may also happen when, in a court composed of several judges (for example, the Divisional Court of the High Court, the Court of Appeal and the House of Lords/Supreme Court), although reaching a certain result, several judges may give different reasons for their decisions.²³⁸ In the first hypothesis, the dominant opinion in England is that all *rationes* bind and a court cannot, in a later case, choose only one of them as binding and relegate the other(s) to the quality of *dictum*.²³⁹ With respect to the second hypothesis, although there is not a defined doctrine about it, the most frequent understanding is in the sense that those cases lack a discernible *ratio decidendi* and, therefore, the court of the subsequent case is free to decide based

²³⁷ As examples of this, see *Bertram Mills Circus Ltd v. Behrens* (1957) 1 ALL ER 583 and *Ashton v. Turner* (1980) 3 ALL ER 870.

²³⁸ As an example of this, see the decision of the House of Lords in *Boys v. Chaplin* [1971] AC 356, in which there were five different lines of reasoning for the decision (although most of them agreed on many points and, above all, on the conclusion of the case).

²³⁹ See, for instance, the decision of the House of Lords in *Jacobs v. London County Council* [1950] AC 361.

upon another parameter.²⁴⁰ In Brazil, as the need to separate *ratio* and *dicta* does not exist, if the precedent has several arguments (even if they do not coincide, taking into consideration the several judges), the later judges or courts can simply decide their cases based upon any argument encapsulated in the precedent. They can use all of the arguments or they can choose one or more of them and relegate the other(s) without caring which of them is *ratio* and which of them are *dicta*. In England, decisions of insufficient motivation or a clear principle, according to the dominant opinion, must be considered as not having *ratio* or binding authority.²⁴¹ This is also not a problem in Brazilian law. For in Brazil it does not matter what is *ratio decidendi* or *obiter dictum* in a case or how well exposed and clear the *ratio* is. It is not part of a court's duty to indicate the *ratio decidendi* of the precedent in order to follow it and everything that was mentioned in it can be considered and cited as a motivation or principle for the court's decision.

3.4 The *Ratio Decidendi* of Precedents in the Context of the Decentralised (“*Difuso*”) Judicial Review of Legislation

The novel bindingness of the Brazilian Federal Supreme Court's decisions in decentralised judicial review of Legislation, as discussed in Chapter 2, shall produce a great impact in the Brazilian legal system. In the future, courts and judges, when deciding cases that deal with a constitutional issue previously decided by the Federal Supreme Court in decentralised review, will be bound to follow the Supreme Court precedent.

However, it is wrong to think that this new bindingness of precedents of the Supreme Court will make the decisions of constitutional cases in lower courts, where the same decided issue arises, a mechanical activity, in which the judge will have the passive role of only to quote the Supreme Court's previous decision and then decide in the same way. On the contrary, this novel form of bindingness will change that

²⁴⁰ See the decision of the Court of Appeal in *Harper v. National Coal Board (Intended Action)* [1974] QB 614. In its decision, the Court of Appeal considered the decision of the House of Lords in *Central Asbestos Co. Ltd. v. Dodd* [1973] AC 518 without *ratio decidendi*, because, in this precedent of the House of Lords, several law lords had given different reasons for their judgments, although a common result had been reached.

²⁴¹ In *The Mostyn* [1928] AC 57, Lord Dunedin said: “If it is not clear, then I do not think it is part of a tribunal's duty to spell out with great difficulty a *ratio decidendi* in order to be bound by it”. See also *National Enterprises Ltd v. Racal Communications Ltd* [1975] Ch 397.

approach that is given to the distinction between what is *ratio decidendi* and what is *obiter dictum* in a Supreme Court's precedent. This distinction, undervalued when it comes to persuasive precedents in Brazil, will appear crucial in the future. Indeed, to understand the functioning of this new rule of *stare decisis* and to make it work appropriately, the issue of identifying the *ratio decidendi* (the essential reasons as it will also be called there) of these decisions of the Supreme Court will become imperative²⁴², because it will be only the *ratio* of these precedents that will bound further decisions.

On the other hand, *dicta* will be only persuasive: if a Justice of the Supreme Court adds, in his opinion, marginal reasons (even those that are important for the development of the law), such reasons will not bind other judges, even those of the first instance. The most carefully considered and deliberate statement of law by any Justice of the Supreme Court, which is a mere *dictum*, will not bind any court or judge in Brazil. Technically, they will be free to follow what they think is appropriate.²⁴³

The task is how to define what constitute the *ratio decidendi* of these decisions proffered by the Federal Supreme Court in the decentralised judicial review and attributing binding effects to it. As in England, the real value of a precedent is not in its dispositive part (that is protected by the *res judicata*), but in the reasons given to justify it.²⁴⁴ However, the decentralised judicial review of legislation performed by the Brazilian Federal Supreme Court has its own peculiarities.

First of all, it is important to note that the judicial review of legislation performed by the Brazilian Federal Supreme Court via extraordinary appeals is only indirectly linked with the facts of the concrete case (which commonly starts before an inferior court, arriving in the Supreme Court after a long journey and other appeals).

²⁴² In a point of convergence, in both English and Brazilian systems, as a rule, a court, when it decides a case, does not explicitly state the *ratio decidendi* of its decision. In other words, as a rule, the *ratio decidendi* of the precedent is not expressly punctuated by the court that issues the decision. It is up to the later court to examine the precedent and extract the rationale of the decision, which may or may not cover the case on trial. See Tucci (2004, p.175). However, as Didier Jr. et al. (2009, p. 385) inform, there are some exceptions to this rule in Brazilian law. The decision of the incident of standardisation of case law (articles 476-479 of CPC) and the incident of declaration of unconstitutionality (articles 480-482 of CPC), which will be addressed in Chapter 4, are good examples of these exceptions.

²⁴³ In practice, of course, although in a strict sense they are not binding, *dicta* from the highest court are likely to be followed and will certainly be given the greatest attention.

²⁴⁴ See Marinoni (2010b, p. 259).

The scope of these extraordinary appeals to the Supreme Court is restricted to the (constitutional) questions of law that were supposedly wrongly resolved by the appealed decision. They are not suitable for (re)considerations of facts and evidence. In particular, it is important to remember the trend of objectification of this decentralised judicial review performed by the Supreme Court, as mentioned in Chapter 2.

Consequently, the *ratio decidendi* of these precedents is not necessarily related to the resolution of the facts of the case. Therefore, it becomes natural to give the force of *ratio decidendi* to the essential legal reasons used to resolve the issues of the extraordinary appeal (even if these reasons are not necessary to the outcome of the concrete case).²⁴⁵ Each of the essential reasons to decide the legal issues of the extraordinary appeal are the *rationes decidendi* and therefore will bind future decisions of analogous questions of law. As Marinoni defends, even preliminary questions, necessary to arrive at the analysis of the merit of the case itself, can give rise to decisions that are fully capable of providing precedents with rationales that shall be bindingly observed in the future.^{246,247,248} Good examples of these preliminary questions are the decisions of the court about its own jurisdiction to decide on certain matters or the decisions on admissibility of the extraordinary appeal, which are capable of constituting a binding precedent. Sufficient evidence of this is the fact that several statements of the persuasive *Súmula* of the Supreme Court deal with these preliminary questions. To illustrate this, the following (non-binding) statements can be mentioned: (i) Statement 279²⁴⁹, which defines that the extraordinary appeal does not serve to review issues of evidence; (ii) Statement 280²⁵⁰, which affirms that the offense concerning the local law does not allow an extraordinary appeal; (iii) Statement 282²⁵¹, which states that the extraordinary appeal shall be dismissed if the federal question [currently, after the advent of the

²⁴⁵ See Marinoni (2010b, p. 246).

²⁴⁶ See Marinoni (2010b, p. 260).

²⁴⁷ See also Ataíde Júnior (2012, p. 78).

²⁴⁸ It also includes the rationales of preliminary decisions pronounced in favour of the losing party. See Marinoni (2010b, p. 260).

²⁴⁹ Approved in 13-12-1963.

²⁵⁰ Approved in 13-12-1963.

²⁵¹ Approved in 13-12-1963.

Constitution of 1988, the constitutional question] that it raises was not discussed in the contested decision; (vi) Statement 634²⁵², which affirms that the Supreme Court does not have jurisdiction to grant a preliminary measure to give a suspensive effect to an extraordinary appeal that has not yet had its admissibility appreciated by the court of origin; and Statement 635²⁵³, which defines that it is a prerogative of the President of the court of origin to grant the preliminary measure to give a suspensive effect to an extraordinary appeal that has not yet had its admissibility appreciated.²⁵⁴

Once these peculiarities of the judicial review of legislation performed by the Federal Supreme Court via extraordinary appeal are exposed, it is possible to conclude that the *ratio decidendi* in these constitutional precedents coincide with the fundamentals used to resolve the issues of the extraordinary appeal, that is, the final understandings of the (constitutional) questions of law encapsulated in the extraordinary appeal, as established by the Supreme Court. In other words, the portion of the precedent that enjoys the binding effect is not the conclusion of the concrete case but the constitutional fundamentals for the decision of the extraordinary appeal, which transcend that concrete case.

In practical terms, in the case of decentralised judicial review of legislation (which commonly occurs via extraordinary appeal), the *ratio decidendi* (or the essential reasons) is precisely the principle of law involving the compatibility (or not) of a normative act and the Federal Constitution, as established by the Supreme Court. This rationale influences the decision of the concrete case, but it is not “the decision” of the concrete case. It is this *ratio* – the declaration of unconstitutionality and constitutionality of a normative act that underlies the decision of the case – that should be, according to the line of understanding that has been progressively prevailed in the Supreme Court, observed by all courts and authorities in cases to come. This can be illustrated with the cases of *Reclamação* 4335/AC²⁵⁵ and *Habeas*

²⁵² Judgment of 24-9-2003 – DJ de 9-10-2003 p. 2.

²⁵³ Judgment of 24-9-2003 – DJ de 9-10-2003 p. 2.

²⁵⁴ As will be seen in Chapter 5, the Federal Supreme Court, before the advent of Constitutional Amendment 45/04, used to issue these non-binding statements. According to article 8º of the Amendment, these statements of the Supreme Court will only have a binding character after its ratification by two thirds of its members and its publication in the official press. It shows that these extremely persuasive old statements of the Supreme Court have not become automatically, with the constitutional reform, binding at all.

²⁵⁵ *Reclamação* – Rcl 4335/AC – STF – *Rapporteur Justice* Gilmar Mendes – j. 21-8-2006 – DJ 25-8-2006, p. 76.

Corpus 82959/SP²⁵⁶ (a clear case of concrete and decentralised judicial review of legislation), both mentioned previously. In *Reclamação* 4335/AC, the *Rapporteur*, Justice Gilmar Mendes, identified – and recognised binding effectiveness to it – the rationale the Supreme Court’s decision in the *Habeas Corpus* 82959/SP: this decision, granting the *habeas corpus* to someone, had considered, as the fundamental to decide (the *ratio decidendi*), that the prohibition of progression of the imprisonment regime of those condemned for hideous crimes determined by the § 1º of article 2º of Law 8072/1990 (Law of Hideous Crimes) as unconstitutional.

3.5 Brazilian Courts and the Seemingly Relevant Precedents

3.5.1 Following a Precedent

In Brazil, traditionally, a precedent is followed in a later case due its power of persuasion. In other words, the principles encapsulated in the decision, although not having a binding character, due to their quality, are followed by the later court. The common law doctrine of *stare decisis* has established some criteria and developed techniques, which, carefully manipulated, safely lead a court in a later case to follow or depart from certain precedents. Despite the general persuasiveness of precedents, these criteria and techniques, carefully adapted, can be applied to Brazilian law.

First, there is the question of the appropriate degree of generality of the matter of the precedent and the matter of the later case. It is necessary, for a persuasive following of a precedent in a later case, that there is a similarity between the issues of both cases. It does not require identity, because it would avoid the possibility itself of applying the precedent.

Mutatis mutandis, as happens in common law jurisdictions with the material facts of the *ratio decidendi* of a precedent, in Brazil an appropriate level of generality should be applied to the matter and the statements encapsulated in the persuasive precedent. Some significance must be attributed to these matters based upon appropriate criteria of generality as representative of an abstract category. Certainly, as the matter of the precedent is considered more broadly, greater will be the

²⁵⁶ *Habeas Corpus* – HC 82959/SP – STF – Full Bench – *Rapporteur* Justice Marco Aurélio – j. 23-2-2006 – DJ 1-9-2006 p. 18.

number of subsequent cases which can fall within the principles that it (the precedent) encapsulates.^{257,258} The generalisation of the matter and the statements of the precedent must have, as parameters and limits, the verification that there is no legal reason to distinguish the issues of the precedent and of the later case, both belonging, in the given situation, to the same category.

3.5.2 Departing from a Precedent

(i) *Distinguishing*

In Brazil, among the techniques used to not follow a precedent, the distinguishing is the principal or, at least, the most common used. Distinguishing can be defined as the non-application of a precedent, despite the case in trial apparently being included in the scope of its holding, basically on the argument that the relevant facts (material facts) of its substantive rationale are not similar, by their peculiarities, to the specific facts of the case in trial.²⁵⁹ In general, if the facts (or, more broadly speaking, the matter) of a precedent, analysed at the appropriate level of generality, do not coincide with the facts (or the matter) of the later case, the cases must be considered by the court or judge of the later case as distinct. Consequently, the precedent will not be followed.²⁶⁰

As in England, what is reasonable to distinguish depends on the analysis of the particular cases. It is also important to be reminded that some judges in Brazil have also an inclination to distinguish the facts or the matter of the case on trial from

²⁵⁷ As McLeod (2011, p. 135) mentions, “the more general, or abstract, the statement of the facts is, the greater the number of subsequent cases which will fall within the principle which is being formulated, and therefore the wider the *ratio* will be”.

²⁵⁸ See the famous *Donoghue v. Stevenson* [1932] AC 562 and *Grant v. Australian Knitting Mills* [1936] AC 85 as examples. In *Donoghue v. Stevenson*, the House of Lords stated that a producer of ginger beer could be liable to the consumer if the beer was contaminated during the manufacturing process, and the consumer became ill by the drinking of the product. It was the *ratio decidendi* of *Donoghue v. Stevenson*, extending the degree of generalization of the fact to another manufactured product, which was applied by the Privy Council in *Grant v. Australian Knitting Mills*, when a wool underwear maker was considered responsible because pieces of its clothes, containing chemical products, caused a kind of dermatitis.

²⁵⁹ See Mello, Patrícia Perrone Campos. Precedentes e vinculação: instrumentos do stare decisis e prática constitucional brasileira. *Revista de Direito Administrativo*, n. 241, jul/set, 2005, p. 186.

²⁶⁰ The distinguishing from statements of the Supreme Court’s Binding *Súmula* will be addressed in Chapter 5.

the facts of the precedent.^{261,262} However, some factors can be cited as grounds for distinguishing in Brazil: (i) recognition of the factual peculiarities in the case to be decided that justify differential treatment of the problem; (ii) recognition of situations that the court that issued the precedent did not want cover, also entailing the avoidance of the application of the previous decisions; and (iii) conflict between the rationale of the precedent with rationales derived from other binding decisions, allowing the limitation of the rationale of that specific precedent.²⁶³

On some occasions, Brazilian judges struggle to distinguish the facts or the matter of the precedent from those of the case on trial. This is a politically correct way to disregard precedents (mainly of a higher court), which they consider unfair and incorrect, even though they were recommended to be followed. It can be argued, however, that Brazilian judges do this unnecessarily, because, as a rule, they do not have to follow precedents as they are merely persuasive (though exceptionally precedents can be binding).²⁶⁴

Undoubtedly, the possibility of distinguishing is important as a means of giving more freedom to the legal system and making justice in the concrete case. However, taken to extremes, the indiscriminate use of the technique of distinguishing has contributed to creating paradoxes in Brazilian case law that fails in granting the value of equality.

(ii) Simply Not Applying a Precedent

²⁶¹ Also concerning England, see the opinion of Lord Reid in *Scruttons Ltd v Midland Silicones Ltd* [1962] 2 WLR 186: "I would certainly not lightly disregard or depart from any *ratio decidendi* of this House. But there are at least three classes of cases where I think we are entitled to question or limit it: first, where it is obscure, secondly, where the decision itself is out of line with other authorities or established principles, and thirdly, where it is much wider than was necessary for the decision so that it becomes a question of how far it is proper to distinguish the earlier decision".

²⁶² But in England, in some cases, courts depart from a precedent improperly. In *Jones v. Secretary of State for Social Services* (1972) AC 944 (HL), Lord Reid states: "It is notorious that where an existing decision is disapproved but cannot be overruled courts tend to distinguish it on inadequate grounds. I do not think that they act wrongly in so doing. They are adopting the less bad of the only alternatives open to them. But this is bound to lead uncertainty (...)".

²⁶³ See Mello (2005, p. 186) and Silva (2005, pp. 247-248).

²⁶⁴ Not always, although, for obvious reasons, the distinguishing has greater relevance for the binding precedents. As Zander states (2004, p. 275), "the process of distinguishing is important, however, not simply as the only means of avoiding a threatening precedent that is binding but equally as a means of avoiding one that is merely of persuasive authority".

Since in the Brazilian system most precedents are not formally binding, they can simply not be followed. Apropos of these persuasive precedents, there is not any institutional constraint and their persuasiveness is the main reason for their being followed in subsequent cases. To illustrate this, in Brazil, great value is given to the circumstances in which a previous case was decided. Judges can recognise that, concerning the matter of the case on trial, there is a precedent. Nevertheless, they disregard the precedent by recognising changes in the circumstances which caused that previous decision and simply pronounce a decision in another sense.^{265,266,267} In these cases, strictly speaking, there is no point in overruling the precedent; courts and judges can simply depart from it.

The fact that in many cases precedents are simply not followed generates a significant amount of contradictory decisions (of courts of the same or different

²⁶⁵ The change in circumstances is identified in Latin through the expression *cessante ratione cessat ipsa lex*, which can be translated as: when the reasons for the existence of the judicial norm cease, the norm itself ceases.

²⁶⁶ Though it is more frequent in Brazilian law, in England this doctrine has a special relevance when it comes to the Supreme Court of the United Kingdom (formerly, the House of Lords) and its power to follow or disregard its previous decisions. Lord Simmon explains the question well in *Miliangos v. George Frank Textiles Ltd* [1975] 3 ALL ER 801: "(1) The maxim in the form *cessante ratione cessat ipsa lex* reflects one of the considerations which your Lordships will weigh in deciding whether to overrule, by virtue of the 1966 declaration, a previous decision of your Lordship's House; (2) in relation to courts bound by the rule of precedent the maxim in its literal and widest sense is misleading and erroneous; (3) specifically, courts which are bound by the rule of precedent are not free to disregard an otherwise binding precedent on the ground that the reason which led to the formulation of the rule embodied in such precedent seems to the court to have lost cogency; (4) the maxim in reality reflects the process of legal reasoning whereby a previous authority is judicially distinguished or an exception is made to a principal legal rule; (5) an otherwise binding precedent or rule may, on proper analysis, be held to have been impliedly overruled by a subsequent decision of a higher court or impliedly abrogated by an Act of Parliament; but this doctrine is not accurately reflected by the citation of the maxim *cessante ratione cessat ipsa lex*".

²⁶⁷ Judges in Brazil can also disregard a previous decision, for instance, under the argument that it was delivered *per incuriam*. Apropos, the amount of *per incuriam* decisions – in the sense of decisions that were delivered in the ignorance of a suitable precedent or even line of precedents²⁶⁷ – is relevant in Brazil. The reason for this is obvious. In Brazil, as there is not a general rule of *stare decisis*, judges sometimes do not carefully search for precedents and erroneous judgments can be delivered because relevant cases are not brought to the attention of the court. The problem is that when a court (*per incuriam*) evaluates a case without the knowledge of a precedent (and it is a relevant or binding precedent), it frequently reaches a different conclusion that it would have reached if it had observed the relevant precedent. In this case, this previous decision is not a defeasible precedent and should not be used as the (only) basis for the decision of the case in trial. In English case law, in *Duke v. Reliance System Ltd* [1987] 2 ALL ER 858, there is a technical definition of *per incuriam* decisions. John Donaldson MR exposes the issue when he says: "I have always understood that the doctrine of *per incuriam* only applies where (a court) has reached a decision in the absence of knowledge of a decision binding on it or a statute, and that in either case it has to be shown that, had the court had this material, it must have reached a contrary decision [...] I do not understand the doctrine to extend to a case where, if different arguments had been placed before it, it might have reached a different conclusion".

hierarchy and even internal disagreements)^{268,269} and the attempts to solve this problem have not been effective. The practice also demonstrates that the appellate courts see themselves as authorised to disregard the precedents of the Superior Court of Justice (the court responsible for the harmonisation of the federal law), sometimes without even giving reasons for this.²⁷⁰

As in England²⁷¹, in case of contradictory decisions, the most common solution is to have the last decision as the most valuable, especially if in this the former conflicting decision was discussed or at least mentioned. However, it is not as simple as this. Although this convention exists, with the last decision considered the most valuable, it is not absolute. Actually, in such cases, within the system, both decisions are *a priori* considered valid. Thus, a court, later called to decide a similar case, considering, for example, the aspects of correction, justice and opportunity, simply tends to opt for one of the decisions and not applying the other.²⁷²

(iii) Overruling a Precedent

²⁶⁸ See Wambier (2012, pp. 36-38) and Marinoni, Luis Guilherme. O precedente na dimensão da segurança jurídica. In Marinoni, Luiz Guilherme (coord). *A força dos precedentes: estudos dos cursos de mestrado e doutorado em direito processual civil da UFPR* (Salvador, JusPODIVM, 2010a), p. 216.

²⁶⁹ To have a broader idea of the relevance of the problem in Brazil, see Josino Neto, Miguel and Leite, Rodrigo Costa Rodrigues. *Análise das divergências jurisprudenciais no STF e STJ* (Salvador, JusPODIVM, 2010). In this book there are collected and analysed hundreds of decisions of both the Federal Supreme Court and the Superior Court of Justice showing the disagreements between the two most important Brazilian courts and also the internal disagreements in each of them.

²⁷⁰ Concerning this issue, see the excerpt of the opinion of Justice Francisco Rezek in *Ação Declaratória de Constitucionalidade – ADC-QO 1/DF STF – Full Bench – Rapporteur Justice Moreira Alves – j. 27-10-1993 – DJ 16-6-1995 – LEX/JSTF*, n. 214, p. 52-53, reproduced in Chapter 2.

²⁷¹ See *Colchester Estates (Cardiff) v Carlton Industries plc* [1984] 2 ALL ER 601: “The court would follow the later, 1984, decision holding as a general rule that where two decisions of the High Court are in conflict, the more recent decision should be followed, and the earlier one not followed, provided that the earlier was considered in the latter, but that it was still open to a judge faced with the inconsistent decisions to apply the earlier and not the later if he is convinced that the later is wrong”. See also *Minister of Pensions v Higham* [1948] 1 ALL ER 863 at 865, [1949] 2 KB 153 at 155, where Lord Denning says: “In this respect I follow the general rule that where there are conflicting decisions of courts of co-ordinate jurisdiction, the later decision is to be preferred if it is reached after full consideration of the earlier decisions”.

²⁷² The same is said in England. According to English law, there is no implicit overruling when a court (except for the House of Lords/Supreme Court) decides in an inverse sense to its previous decision. In several cases it can be said that, in the later decision, the conflicting previous decision was not even observed. Consequently, due to the ignorance of a binding precedent, the later decision was *per incuriam* and not valid. Indeed, the convention exists (the last decision is likely to be considered valid), but is not absolute, being just a safe path to be followed.

Theoretically, it is possible that a legal system can be based upon the doctrine that courts and judges must always follow precedents without any possibility of departing from or overruling them. In England until 1966, the House of Lords, formally renouncing the power to overcome its previous decisions, strictly followed this doctrine. In that year, the court announced, in a practice statement, that its judges (and, consequently, the court as a whole) could explicitly depart from or overrule^{273,274} their previous decisions when they think it is right to do so. Currently, it can be said that this extreme view of the doctrine of binding precedents is not accepted in any legal system, even those strictly following the doctrine.

In England, however, to evaluate the convenience of overruling a precedent is not an easy task. Several questions must be balanced, especially because such an act implies a strong attack against the fundamentals of the system of binding precedents. The incorrectness, injustice and inconvenience of the precedent should be clearly certified as well as evaluating the damage for the stability of the system, which, definitely, to a greater or smaller degree, provokes some change in case law.²⁷⁵

²⁷³ It is important to not confound overruling and overriding. In case of an overriding, a court limits the scope of the rationale of a previous case, due the occurrence of posterior changes in the legislation or in some principle of law. In practice, the overriding would be nothing more than a case of partial withdrawal of the rationale of a precedent, by virtue of a posterior rule that limits its amplitude. In the case of overriding, the court deals with a kind of situation that was not involved in the precedent that established the previous doctrine and thus concludes that, given the further development of issue, the case deserves a differential treatment under the new rule. Regarding the Brazilian legal literature, see Didier Jr. et al. (2009, p. 396), Silva (2005, p. 297) and Marinoni (2010b, pp. 346-349).

²⁷⁴ It is also convenient to distinguish overruling and reversal in Brazil. Similar to England, in Brazil they are not interchangeable and carry different consequences. The second is the reform of a decision of a court *a quo*, made by a court *ad quem*, through an appeal, within the same procedure. A court can overrule its own precedents or even precedents of lower courts. The prior decisions continue to bind their parties, but the overruled precedent is no longer authoritative to subsequent cases. By contrast, when a court *ad quem* reverses the decision of a court *a quo*, considering it as erroneous (on the facts or on the law) the prior decision in that specific case, this decision is no longer applied in that case. As for the situation in England, see Ginsburg, Jane C. *Legal Methods* (Westbury, The Foundation Press, 1996), p. 5.

²⁷⁵ Concerning England, Reynolds sums up the issue very well: an overruling requires the English judge “to determine that the old rule was a mistake, or that society has changed since it was announced, or that the new rule simply works better. (...) Although deciding that establishing a new rule would better serve society is necessary to the decision to overrule, it is not in itself sufficient; the larger question of whether to overrule requires consideration of other societal interests, and whether those interests are sufficient to require adherence to a ‘wrong’ decision. The major factor to be considered in determining whether to overrule precedent is the value of a regime of *stare decisis* (...). Every overruling requires that a price be paid: loss of stability and confidence, damage to the efficiency of the system, reduction in predictability. A court must analyze these factors so that it can cast a balance on the profit or loss to be gained from overruling. Although some of the factors to be considered are relatively determinate in their effect, careful analysis can help resolve some of the problems”. See Reynolds, William L. *Judicial Process in a nutshell* (2nd ed, St. Paul, West Publishing Co.,

The Brazilian common approach to this question is different. Brazilian courts and judges, educated under a civil law perspective, believe that they are entitled to change their views and pronounce different decisions when they think it is the right case. The historical absence of a doctrine of *stare decisis* always allows judges to take the wisdom from the past but also suggests that they are freely able to depart from what they consider incorrect.²⁷⁶

In the Brazilian legal literature, a set of factors that could cause or base the overruling of a precedent can be mentioned: (i) the precedent is considered wrong; (ii) the precedent causes an obvious injustice; (iii) the precedent no longer represents good public policy; (iv) circumstances have changed since the precedent was decided; (v) the Parliament has legislated differently about the point of law; (vi) the precedent is a very recent decision; (vii) it is a very old decision; (viii) the precedent is preventing the development of law; (ix) the rule set out in the precedent is more procedural than substantial; (x) the precedent has led to a series of detailed distinctions that only increased the uncertainty of the law; (xi) the precedent is a consequence of a judicial error or conflict with other decisions or principles already consolidated; and (xii) the composition of the court has changed.²⁷⁷ Despite being good reasons to no longer apply or explicitly overrule a precedent, these many factors are not imperative. They also do not constitute an exhaustive list. It seems more correct to say, especially considering the dynamic of law, that the reasons for overruling a precedent in Brazil may only be checked when examining the case in trial.

The allowance of courts and judges to freely depart from or overrule what they consider incorrect is to be considered a weak point in the Brazilian legal system. Assessing the appropriateness of overruling a precedent should not be as easy task as it is. Several questions would have to be carefully balanced. The inaccuracy, injustice or inconvenience of the precedent should be considered but also the damage to the stability and predictability of the system that any change in the law certainly leads.^{278,279} However, reflecting on the possibility of a precedent that has

1991), p. 169.

²⁷⁶ See Souza (2006, p. 290).

²⁷⁷ See Silva (2005, p. 263).

²⁷⁸ See Souza (2006, p. 150).

²⁷⁹ As Sotelo explains, overruling is similar to a public statement, "*coram populi*", that the cases

been decided incorrectly, Brazilian courts commonly assert that it is more valuable that they decide correctly based upon a later and more elaborated evaluation of the matter than keeping the consistency of the previous decisions. If a court believes, for instance, that the old case law was a mistake, society has changed since it was stated or even that a new rule would simply work better (or would better serve society), it departs from or even overrules the precedent. The broader questions of whether the overruling would affect other societal interests (stability, certainty and equality, among others) and whether those interests are sufficient to impose adherence to an “incorrect” precedent are not common objects of concern for Brazilian judges.²⁸⁰ Consequently, the impact of the abusive use of overruling for the stability and predictability of Brazilian legal system cannot be hidden.²⁸¹

Finally, the overruling of precedents can be classified in Brazil into the following: (i) explicit overruling, when a court decides to expressly adopt a new direction, abandoning the previous one; and (ii) tacit or implied overruling, when a new understanding is adopted by the court, but without expressly replacing the old one.²⁸² The explicit overruling of precedents – when a court, entitled with power to do so, explicitly states that it is overruling a precedent or a line of precedents and, consequently, the overruled precedents (more precisely their *ratio decidendi*) are no longer officially accepted as authority in later cases²⁸³ – is less common in Brazil than the implied form.²⁸⁴ Understanding this does not require deep consideration. In Brazil, due to the absence of a general doctrine of binding precedents, if a court wishes to change its point of view about the law (even one that has prevailed for many years, that has been repeatedly pronounced and constantly applied by everyone), it is empowered to do so. On some occasions, it performs this silently, by initiating a new line of precedents. On other occasions, the court simply argues, *en*

previously based upon the wrong precedent had actually been decided contrary to what, in fact, is taken as law. See Sotelo, José Luis Vasquez. A jurisprudência vinculante na “common law” e na “civil law”. In Calmon Filho, Petrônio and Beltrame, Adriana. *Temas atuais de direito processual ibero-americano* (Rio de Janeiro, Forense, 1998), p. 369.

²⁸⁰ See Souza (2006, p. 290).

²⁸¹ The stability and predictability of the Brazilian legal system will be compared in more detail with the English system in Chapter 6.

²⁸² See Didier Jr. et al. (2009, p. 395).

²⁸³ As an example in England, it can be cited the of explicit overruling of *Chandler v. Webster* [1904] 1 KB (a Court of Appeal's precedent of 1904) by the decision of the House of Lords in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* [1943] AC 32.

²⁸⁴ As an example, the decision of the House of Lords in *R v. Porter* [1949] 2 KB 128 can be cited.

passant, that the precedent is not compatible with a later decision of a higher court, with the changing of the statute book or even the more fluid argument of social developments. The fact is, without explicitly saying that it is overruling a precedent or a line of precedents, the court simply decides inversely to its previous decisions and creates a new case law. Differently to explicit overruling, in the hypothesis of implied overruling, as the precedent was not officially declared as a non-authoritative source, potentially it can *per incuriam* be followed in later cases, which is quite a common situation in Brazil indeed.

3.6 The Issue of Prospective Overruling in the Context of the Decentralised (“*Difuso*”) Judicial Review of Legislation

(i) Initial Remarks

The issue of prospective overruling is nowadays of special relevance. It is related to the time effectiveness of the decision that announces a new case law, overruling or at least changing the case law encapsulated in a previous line of precedents: are the “effects” of this new decision to be retroactive or merely prospective?

Based on the declaratory or orthodox theory – which affirms the pre-existence of law, whether it is legislated or are customs, in relation to the judicial decision – the English traditional approach used to support the idea that these “effects” are to be retroactive. As Zander explains: “When a court delivers a ruling which is perceived to change the law the effect is not only for the future. It also affects the past. This is because of the fiction that when it states the law a court is stating the law as it always has been”. Evidently, the same author concludes,

if the case has already been litigated it cannot be reopened. It is subject to the principle expressed in the phrase *res judicata*. Equally, if the time allowed under the Statute of Limitations for bringing proceedings of that kind has expired, no case can now be brought on the basis of the changed rule. But if neither *res judicata* nor the Statute of Limitations applies, an action can be brought based on circumstances that occurred before the new decisions.²⁸⁵

²⁸⁵ See Zander (2004, p. 393).

Currently, however, the question in England cannot be analysed so simply. English courts, inspired by the American example^{286,287}, have departed from the classical doctrine, (that is, the retroactive application of the new precedent) and have applied, or at least discussed the hypothesis of applying, prospectively the new precedent. In administrative law, for instance, especially when it comes to conceding the so-called “remedies” for citizens, the English courts have given prospective effects to the new precedents to avoid administrative chaos. In at least two recent cases (recent for England, not for Brazil), *Jones v. Secretary of State for Social Services* [1972] AC 944 and *Miliangos v. George Frank (textiles) Ltd* [1976] AC 443, the hypothesis of prospective application was considered positively.²⁸⁸

²⁸⁶ As Ginsburg (1996, p. 155) explains, in the United States, the rule is the classic retroactive application of the new precedent, i.e., “as a general matter, judicial decisions in fact do apply to events that occurred before the new or changed rule was declared. However, where prior decisions have been overruled, the parties to those cases are not free to reopen the case, if it has already been the object of a final judgment”²⁸⁶. This has been the understanding since the beginning of the 19th century with the decision in *United States v. Schooner Peggy* 5 US (1 Cranch) 102 (1801). However, the American law is less strict than the English law regarding the traditional retroactive application of the new case law. Actually, courts there, different from what happens in England, often apply overruling precedents prospectively and do this in two different ways: (i) when announcing the new rule, simultaneously indicating from when it has to be applied to other cases²⁸⁶ as occurred in *Durham v. United States* 214 F. 2d 862 (1954); or (ii) leaving the question to the court where maybe the question, in the future, will be discussed, which, as a matter of fact, is what usually happens. It is said that the first case in which the Supreme Court of the United States clearly recognized the validity of the prospective application was *Great Northern Ry v. Sunburst Oil & Refining Co.* 287 US 358 (1932). But the most symbolic case of prospective effect is considered to be *Mapp v. Ohio* 367 US 643 (1961). Indeed, the Supreme Court, was called upon to evaluate the question of the time effectiveness of *Mapp v. Ohio* in *Linkletter v. Walker* 381 US 618, 620 (1965), and ended up stating that it was not possible to give completely retroactive effects to that decision (the *Mapp v. Ohio*’s).

²⁸⁷ About the development of the prospective decision-making in the USA, see also Reynolds (1991, pp. 172-173).

²⁸⁸ For the first of them, for instance, Lord Simon of Glaisdale asserted: “I am left with the feeling that, theoretically, in some ways the most satisfactory outcome of these appeals would have been to have allowed them on the basis that they were governed by the decision in Dowling’s case, but to have overruled that decision prospectively. Such a power – to overrule prospectively a previous decision, but so as not necessarily to affect the parties before the court – is exercisable by the Supreme Court of the United States, which has held it to be based on the common law: see *Linkletter v. Walker* (1965) 381 U.S. 618. (...) the true, even if limited, nature of judicial lawmaking has been more widely acknowledged of recent years; and the declaration of July 20, 1966, may be partly regarded as of a piece with that process. It might be argued that a further step to invest your Lordships with the ampler and more flexible powers of the Supreme Court of the United States would be no more than a logical extension of present realities and of powers already claimed without evoking objections from other organs of the constitution. But my own view is that, though such extension should be seriously considered, it would preferably be the subject-matter of parliamentary enactment. In the first place, informed professional opinion is probably to the effect that your lordships have no power to overrule decisions with prospective effect only; such opinion is itself a source of law; and your Lordships, sitting judicially, are bound by any rule of obviating any suspicion of endeavoring to upset one-sidedly the constitutional balance between executive, legislature and judiciary. Thirdly, concomitant problems could receive consideration – for example, whether other courts supreme within their own jurisdictions should have similar powers as regards the rule of precedent; whether machinery could and should be devised to apprise the courts of the potential repercussions of any particular decision; and whether

Until recently, this kind of dilemma had not emerged among Brazilian scholars and judges. Traditionally, under Brazilian law, a judicial decision was not a primary (or true) source of “law”, but merely secondary evidence of “law”. The judicial decision, according to this orthodox point of view, is supposed to be a mere declaration or proof of something – for instance, customs and mainly legislated norms – that previously already existed. As a consequence, the new precedent is expected to be retroactive. Another explanation of the traditional recognition of retroactive effects in Brazil is based on the fact that it is not presumed that the new decision will bindingly affect facts and transactions that took place under the previous case law orientation. The main criticism of the retroactive application of a binding new precedent resides in the fact that the new precedent could affect juridical acts (and even judicial decisions) that happened in the past, all of these acts performed based upon the confidence in the correctness of the previous case law (sometimes, a binding case law). This generates a major concern in common law jurisdictions, once people are supposed to regulate their life (and lawyers are supposed to counsel) according to what the courts bindingly state, in judicial decisions, as being the law. In systems based upon the legislative norm, as traditionally is the case in Brazil, a decision in a specific case is not to be bindingly applied to other similar cases and people are supposed to regulate their lives directly according to what is in the statutes and codes than to what is stated by the courts.²⁸⁹

any court (including an Appellate Committee in your Lordships’ House) should sit in banc when invited to review a previous decision”.

²⁸⁹ However, also in civil law France, as Steiner (2010, p. 101) affirms, the Court of Cassation, considering the scope of the judicial function within the wider principle of the separation of powers, seems to take such a step towards prospective overruling in quite limited specific circumstances. According to her, “In 2004, the Molfessis Report on *Revirements de Jurisprudence* to the Court of Cassation recommended that, in narrowly defined circumstances, decisions of the Court of Cassation might be applied ‘non-retroactively’. Without setting out any (p. 100) formal factors or criteria to be taken into account when considering whether a new ruling by the Court of Cassation should apply retrospectively or not, the Molfessis working group nevertheless recommended that the court should limit the retrospective temporal effect of its ruling where there is (1) a strong motive of general public interest or (2) a manifest disproportion between the general benefits attached to the retrospective effect of a court ruling (e.g. the fact that persons in like cases are treated equally) and the potential unfairness such a retrospective change in the law would occasion to the parties involved. This working group further recommended procedural safeguards in so far as prospective overruling, as defined above, could only be applied by the Court of Cassation itself which for that purpose should, first, identify clearly and explicitly the meaning and scope of its *revirement* in the case at hand and, secondly, allow each party to the case to put forward their respective arguments on whether to overrule a previous decision retrospectively or prospectively. Without waiting upon the actual publication and recommendations of the Molfessis Report, the Court of Cassation took upon itself to overrule prospectively a former interpretation of a time-limitation rule for libel in a case where a radio station was sued for breach of the principle of presumption of innocence against a lawyer charged for professional misconduct (Radio France SA, Cass. 2, 8 July 2004, D. 2004, 2956)”.

Even in the case of the judicial review of legislation, where some decisions of the Supreme Court are expected to bind other courts, the retroactivity of the decisions has been the rule. The doctrine consecrated by Justice Marshall in *Marbury v. Madison*²⁹⁰, stating that the unconstitutional law is null, void and of no effect, has been widely accepted in Brazilian law since the beginning of the Republican period.²⁹¹ At that time, Rui Barbosa, one of the greatest Brazilian jurists, said that any legislative or executive act that disregards constitutional provisions is, in essence, null. This doctrine was followed by a list of authors of classic texts on the subject, such as Francisco Campos, Alfredo Buzaid, Castro Nunes and Lúcio Bittencourt.²⁹² As this understanding prevails in Brazil, the decision that declares the unconstitutionality of a law commonly retroacts, which leaves all acts based on this unconstitutional law as invalid.

Although the retroactive application is much more common in Brazil (and theoretically fits better with the Brazilian declarative understanding to precedents), due to the new categories of binding precedents developed there, scholars and judges recently began to realise that in certain situations retroactive decision-making imposes unfair solutions.²⁹³ It was inevitable that, in some exceptional situations, the general rule was mitigated, eliminating or reducing the consequences of the retroactivity, in favour of values such as good faith, fairness and legal certainty. After all, as everyone acts – or is expected to act – in accordance with the existing norms, there is a need to maintain confidence in the relations established under the aegis of a normative act that is presumably constitutional.²⁹⁴ As a result, prospective

²⁹⁰ *Marbury v. Madison* 5 US 137, 1 Cranch 137, 2 L.Ed. 60 (1803).

²⁹¹ See Ataíde Júnior (2012, p. 183).

²⁹² See Barroso, Luís Roberto. *O controle de constitucionalidade no Brasil: exposição sistemática da doutrina e análise crítica da jurisprudência* (São Paulo, Saraiva, 2004), pp. 15 and 17.

²⁹³ See Ataíde Júnior (2012, p. 162).

²⁹⁴ Despite the general rule of retroactivity, at least since the 1940s, the legal literature, particularly through the teachings of Lúcio Bittencourt, has defended the relativity of the doctrine of retroactivity of the effects of the decision in the judicial review of legislation. In that case, the decision pronouncing the unconstitutionality does not completely erase the factual effects produced during the period in which the constitutionality of the norm was believed in. See Bittencourt, Lucio. *O controle jurisdicional de constitucionalidade das leis*. (Atualizado por Jose Aguiar Dias, Brasília, Ministério da Justiça, 1949), pp. 148-149.

overruling decisions began to be adopted by the Supreme Court (a technique rarely adopted by others courts yet).²⁹⁵

Certainly, the prospective overruling is also criticised in Brazil. For instance, it is argued that: a) a court that uses the prospective overruling has the appearance of a Legislator and usurps a function that constitutionally does not belong to it. The prospective application is undesirable because it promotes “judicial” law reform and law reform must come from the democratically elected Legislature. The role of the Judiciary is to interpret the law, not to enact laws. Only the Legislature has the power to change the law prospectively; b) sometimes, the technique can discourage the debate on new constitutional issues. Parties and their lawyers have less incentive to address new constitutional issues or to fight for a favourable decision, if they know that the decision would not affect their own cases but only future litigations; c) finally, much of the prospective application doctrine is based on the arguments of legal certainty (the trust that people have in the legislation) and exceptional social interest, as prescribed by article 27 of Law 9868/1999. These arguments introduce into the debate elements of indeterminate concepts.²⁹⁶

However, despite the criticism, giving prospective effects to decisions in the judicial review of legislation has sometimes appeared to be the most convenient solution or even imperative. The maintenance of the effects produced by the unconstitutional norm during its “constitutional” term, in certain cases, further safeguards the supremacy of the Constitution and the principles and rights that it encapsulates than an unconditional assignment of retrospective effects to the decision that affirms the norm unconstitutional.

²⁹⁵ The issue of prospective overruling was also addressed by the Superior Court of Justice, which is responsible for the unity of the federal law in Brazil, in *Recurso Especial* – EDiv-REsp 738689/PR – STJ – 1st Great Panel – *Rapporteur* Justice Teori Albino Zavascki – j. 27-6-2007 – DJ 22-10-2007 p. 187. In a much criticized decision, the majority of the Panel expressly decided not to give prospective effects to its decision in that case (that dealt with an issue of tax law), simply stating that this modulation of the temporal effects of the decisions is only allowed in the terms of the Law 9868/1999 and this law is only concerned with decisions of the Federal Supreme Court. On the other hand, if the Superior Court of Justice does not allow itself to directly issue decisions with prospective effects, it has constantly recognised prospective effects in previous decisions of the Federal Supreme Court, even when the Supreme Court had not expressly stated that its decision was prospective, as in *Habeas Corpus* – HC 28598/MG – STJ – 5th Panel – *Rapporteur* Justice Laurita Vaz – j. 14-6-2005 – DJ 1-8-2005 – RT vol. 841 p. 495. In doing this, that is spontaneously recognising prospective effects in the decision of the Supreme Court, indirectly the Superior Court of Justice is also given prospective to its own decision.

²⁹⁶ See Souza (2006, pp. 160-163).

Different to the Portuguese Constitution, for example, the Brazilian Constitution of 1988 does not expressly contemplate the possibility of limiting the retroactive effect of the decisions of unconstitutionality.²⁹⁷ Following the American example, this silence regarding the term *a quo* for the temporal effects of the decision of unconstitutionality is interpreted in the sense that this regulation was left to the Legislature. However, even before the event of Law 9868/99, which expressly authorises the prospective effects in judicial review of legislation, the Supreme Court had already given prospective effects to some of its decisions, despite the absence of legislative regulation. With the advent of Law 9868/1999, the possibility of modulation of temporal effects of constitutional decisions was disciplined by its article 27 as follows: “In declaring the unconstitutionality of a law or normative act, the Supreme Court may, based on reasons of legal certainty or exceptional social interest, by a majority of two thirds of its members, restrict the effects of that statement or decide that it has only effectiveness from the *res judicata* or other moment it decides appropriate”.

Currently, the Brazilian Supreme Court, in order to not disturb the past, has often refused to retrospectively change the law (notwithstanding the fact that it has expressed its disapproval over the normative act) and has pronounced that some of its understandings are to be followed just for the acts and transactions to be performed after the respective decisions. If it is the case that the new precedent is to be prospectively applied, the Supreme Court, when announcing the rule, sometimes indicates simultaneously a precise date from which the new precedent should be applied. The Supreme Court normally does not leave the question of time effectiveness to be decided by the court where the same point of law will be discussed in the future (because, with the possibility of many different points of view about time effectiveness, this could affect the uniformity of the application of its case law).

Although, in principle, Law 9868/1999 concerns the centralised judicial review of legislation, in fact, the modulation of the temporal effects of the declaration of unconstitutionality has been admitted by the Supreme Court in both centralised and decentralised reviews. Regardless of the model control of constitutionality (centralised or decentralised), it is always necessary to inquire about the possible

²⁹⁷ See Ataíde Júnior (2012, pp. 185-186).

effects that the decision of unconstitutionality can cause in concrete situations. In both controls of constitutionality, although the retroactive effects of the decisions that affirm the unconstitutionality of a statute or other normative act continue to be the rule, sometimes the incidence of these retrospective effects may appear more harmful to the legal system than the own offense to the Constitution. In these cases, the temporal modulation of the declaration of unconstitutionality, giving to it prospective effects, may appear indispensable.²⁹⁸

(ii) *The Mira Estrela Case*

The leading case in this issue was Extraordinary Appeal (*Recurso Extraordinário*) 197917/SP²⁹⁹, also known as *Mira Estrela* case, where the possibility of given prospective effects to the Supreme Court's decisions in decentralised judicial review of legislation was widely discussed.

In *Mira Estrela*, in 2002, the Supreme Court had to decide the fate of the representatives of the local Parliament of Mira Estrela, a town with only 2600 inhabitants in the State of São Paulo. In 1990, the local Parliament had approved a bill increasing from nine to eleven the number of city representatives. The Supreme Court understood that the local law was unconstitutional, since it does not follow the proportion prescribed by article 29, IV, “a”, of the Federal Constitution. In doing this, the Supreme Court faced a dilemma: if the law was retroactively unconstitutional, all acts enacted by the Parliament of Mira Estrela since 1990 – a period of 12 years – would also be unconstitutional, which would have serious problems for the local government.

Besides, a decision with retrospective effect would lead to the dissolution of the local Parliament. There would not be a Parliament to deliberate a new resolution

²⁹⁸ In Brazil, concerning their temporal effects, the constitutional decisions may be classified into two general categories: retrospective or prospective decisions. However, analysing the Supreme Court case law, it is possible to see some variants inside each of these two original matrixes. These variants aim, through minor adjustments, to overcome the problems existing in both options. The following classification is based on comparative law, but aims to cover the particularities of Brazilian law. Basically, in Brazil, it is possible to mention the following variants: (i) pure retroactivity; (ii) classical retroactivity; (iii) retroactivity at a specific time; (iv) pure prospectivity; (v) classical prospectivity; (vi) and prospectivity at a specific time. The classification proposed will be fully addressed in Chapter 4, where the binding decisions of the Federal Supreme Court in the concentrated judicial review of legislation will be analysed.

²⁹⁹ *Recurso Extraordinário* – RE 197917/SP – STF – Full Bench – *Rapporteur* Justice Mauricio Correa - j. 6-6-2002 – DJ 5-7-2004 pp. 00008 – EMENT VOL-02150-03 pp. 00368.

adjusting the local Organic Law to what is stipulated by the Federal Constitution in terms of the number of the local representatives. If this occurred, the democratic principle itself would be strongly affected, because the population of that municipality would be totally devoid of local representation. The absence of one of the municipal powers, the Legislature, would create an unbridgeable gap in the constitutional principle of the separation of powers, especially considering that the rule of law concerning the actions of the Executive Branch depends largely on what is deliberated by the Legislature (the task of the Executive is mainly the implementation of laws).

The solution reached by the Supreme Court was to modulate the temporal effects of the declaration of unconstitutionality, opting for postponing these effects until the subsequent elections and the next period of mandate (which in Brazil is renewed every four years). In other words, in a case of prospectivity at a specific time, the Supreme Court was pleased to declare the unconstitutionality of the local law without altering the composition of the current Legislature, thus protecting the validity of laws enacted by this composition.

In this famous decision of the Supreme Court, legal certainty, the democratic principle and the fundamental rights of the citizens (particularly their political rights, ensuring their representation) worked together. It was an exceptional situation in which a declaration of nullity, with its common *ex tunc* effects, would indirectly result in a serious threat against the principles protected by the Federal Constitution and the legal system as a whole. This exceptional social interest imposed an exceptional declaration of unconstitutionality with prospective effects.

After *Mira Estrela*, the Federal Supreme Court has continued to give prospective effects to their decisions, as in Extraordinary Appeal 442683-8/RS³⁰⁰, a case concerning the way citizens can enter and progress in the civil service. In this case, it was demanded the nullification of the administrative acts that had granted to civil servants, based on internal competitions or contests, access/progress to completely different posts in the civil service. The Supreme Court, although it had expressly recognised the unconstitutionality of these internal contests in order to progress to different posts in the civil service, based on the principles of good faith and legal certainty, did not nullify the acts of access/progress of the civil servants

³⁰⁰ *Recurso Extraordinário* – RE 442683-8/RS – STF – 2nd Panel – *Rapporteur* Justice Carlos Velloso – j. 13-2-2005 – DJ 24-3-2006.

involved in this concrete case. The Supreme Court ascertained that the Federal Constitution, in article 37, II, had instituted the civil service exams as the means of access to the civil service. However, the court also stated that, at the time of the events (from 1987 to 1992), the understanding on the topic was not consolidated. Only on 17 February 1993 did the Supreme Court, in a case of centralised judicial review of legislation, suspend with *ex nunc* (prospective) effects, the effectiveness of article 8º, III, article 10, sole paragraph, article 13, § 4º, article 17 and article 33, IV, all them of Law 8112/1990, having these provisions been finally declared unconstitutional on 27 August 1998 (in Direct Action of Unconstitutionality 837/DF).³⁰¹ Consequently, the principles of good faith and legal certainty (and the fact that disturbance of the Administration would be greater than any benefits from the undoing of the administrative acts) authorise the adoption of *ex nunc* effects to the decision that declares the unconstitutionality.

Finally, it is important to mention that the Federal Supreme Court has also adopted the doctrine of progressive unconstitutionality, which is similar but is not the same as prospective overruling. Indeed, in *Habeas Corpus* 70514/RS³⁰², the Supreme Court had to incidentally appreciate the constitutionality of Law 1060/1950 (text altered by Law 7871/1989), which grants free legal assistance to poor people and, in §º 5 of article 5º, gives double time limit to public defenders in order to appeal of decisions (and perform others acts in courts). Although at the time the provision seemed – and, indeed, it proved to be – unconstitutional, the Federal Supreme Court preferred to affirm that the provision that gives double time to public defenders was constitutional until the public defence service is duly qualified or structured at the same level of the prosecution service. A similar decision was also found in Extraordinary Appeal 341717/SP³⁰³, where it was remembered that the same constitutional controversy had been resolved by the Supreme Court in Extraordinary

³⁰¹ *Ação Direta de Inconstitucionalidade* – ADI 837/DF – STF – Full Bench – *Rapporteur* Justice Moreira Alves – j. 27-8-98 – DJ 25-6-1999.

³⁰² *Habeas Corpus* – HC 70514/RS – STF – Full Bench – *Rapporteur* Justice Sidney Sanches – j. 22-3-1994 – DJ 27-6-97 pp. 30225 – Ementário vol. 01875-03 p. 00450.

³⁰³ *Recurso Extraordinário* – RE-AgR 341717/SP – STF – 2nd Panel – *Rapporteur* Justice Celso de Mello – j. 5-8-2003 – DJe-040 DIVULG 04-03-2010 PUBLIC 05-03-2010 – EMENT VOL-02392-03 PP-00653 – RTJ 162/887.

Appeal 135328/SP.³⁰⁴ In Extraordinary Appeal 341717/SP, the Supreme Court also preferred to maintain the constitutionality of the double time limit to public defender's manifestations, while the state of São Paulo did not establish and organize the local Public Defender's Office, as determined by the Federal Constitution (article 134). The provision – in this case, article 68 of the Code of Criminal Procedure (Decree-Law 3689/1941) that also establishes the double term – was considered constitutional, but placed in a transient intermediate state “between the states of full constitutionality and absolute unconstitutionality”, subjected, in the face of supervening changes in the circumstances of fact, to a progressive process in order to become unconstitutional. The state of omission in the due performance of its duties, such as when the local Legislature or the Executive refrains from adopting the measures required to implement the organic structures dictated by the Federal Constitution, the Supreme Court asseverated, culminates in establishing “constitutional imperfect situations”, whose occurrence justifies “a different treatment, not necessarily reduced to the regime of absolute nullity”.³⁰⁵

(iii) Defining Legal Certainty and Exceptional Social Interest

Apart from the arguments of legal certainty and exceptional social interest, it is possible to present, based on the Brazilian judicial practice, other reasons in favour of the prospective effects of the Supreme Court's decisions in the decentralised judicial review of legislation. For example, a mandatory adoption of retroactive effects could certainly influence the court's attitude, where it has to appreciate a case that can potentially give rise to the declaration of unconstitutionality of a normative act and affect facts legitimately performed under

³⁰⁴ *Recurso Extraordinário* – RE 135328/SP – STF – Full Bench – *Rapporteur* Justice Marco Aurélio – j. 29-6-1994 – DJ 20-04-2001 PP-00137 – EMENT VOL-02027-06 PP-01164 – RTJ VOL-00177-02 PP-00879.

³⁰⁵ It is also important to distinguish (prospective) overruling from signalling. The latter is the technique by which the court follows the precedent, but alerts the community about the fact that this precedent is no longer reliable. By use of signalling, the court paves the way to further overruling a doctrine or rule that would otherwise have to be preserved because of the justified confidence placed in it. After the signalling, however, no confidence, at least justified, can be used as an argument for maintaining the old doctrine, so that, when the doctrine is overruled, it is not uncommon for courts to make retroactive its decision until the date of the signalling, because from that point there would not be more justified confidence in the doctrine. When a precedent is prospectively overruled a new doctrine is at the same time established, although it only has effect *ex nunc* or after some time. See Silva (2005, p. 296), Mello (2005, p.189) and Marinoni (2010b, pp. 335-343).

the aegis of the normative act once presumed constitutional. Maintained, *a priori*, only the possibility of retroactive effects (*ex tunc*) to the decision that affirms the unconstitutionality of the norm, the court, as a matter of legal policy, would be more conservative, hesitant to make the abrupt change of direction in that particular issue. On the other hand, open the possibility of limiting the impact of the decision, in order not to reach situations prior to the decision itself (*ex nunc*) or even not to reach the facts of the case itself (in the case of decentralised and concrete control), the court feels inclined – or at least liberated from any constraint of giving an unfair decision to people who acted while relying on the unconstitutional norm – to affirm the unconstitutionality when it understands this the correct measure.

However, in Brazil, the choice between a prospective or retroactive application of the decision of unconstitutionality is, under article 27 of Law 9868/1999, indispensably linked with the definition of the indeterminate legal concepts of legal certainty and exceptional social interest.

The expression legal certainty has had its general meaning already sufficiently established in Brazil. In summary, the legal system has to provide to the subjects the possibility to regulate their conducts with certainty and protect them from arbitrary conduct of the State. Closely related to the meanings of trust, good faith and predictability, the idea of legal certainty in the judicial review of legislation aims to guarantee the respect for the acts established under the aegis of the legislation imposed by the Parliament, which is aprioristically presumed to be constitutional.³⁰⁶

The concept of exceptional social interest, on the other hand, is much more fluid. First of all, it is important to note that any constitutional principle may take the form of exceptional social interest. Indirectly, it is this constitutional principle, weighted and balanced with the principle of the nullity of the unconstitutional law, that will show if the best alternative to ensure the supremacy of the Constitution as a whole is the retroactivity or the prospectivity of the temporal effects of the decision. The characterisation of the exceptional social interest referred to in article 27 of Law 9868/1999 presupposes the analysis of principles that support the maintenance of the effects of the unconstitutional norm, as well as the analysis of principles that recommend complete nullification of the unconstitutional norm with retroactive

³⁰⁶ See Ávila, Ana Paula. *Modulação de efeitos temporais pelo STF no controle de constitucionalidade* (Porto Alegre, Livraria do Advogado, 2009), pp. 146-157.

effects. Having identified these principles, there is a need to define what prevails in that specific case. This weighting and balancing is the resource that the Supreme Court used when the traditional method of simple subsumption is inadequate, especially important with regard to fundamental rights.^{307,308}

The technique of weighting and balancing in order to promote the prospective overruling should not be exercised *in absentia* of formal criteria, allowing the interpreter (in this case, the Federal Supreme Court) to make arbitrary decisions without a legal or constitutional basis. The weighting and balancing procedure needs to be structured in the form of legal argumentation. It is necessary: (i) to identify the principles, values, rights and interests that conflict in the case; (ii) to place on one side those arguments which support these effects and, on the other, those arguments which recommend the traditional retroactive effects; (iii) to assign significance and weight for each of these principles, values, rights and interests; (iv) and to determine which principles, values, rights and interests must prevail.³⁰⁹

The identification of the arguments or principles to be weighted is done case by case. However, based both on the specialised literature and the case law of the Supreme Court, it is possible to mention some legal arguments that, under the Brazilian Constitution of 1988, are the most valuable.

³⁰⁷ Following Alexy's opining that, conversely to Dworkin, affirms that a conflict between principles should be resolved by appeal to balancing, the way legal reasoning works better when applied to principles. See Alexy, Robert. On Balancing and Subsumption. A Structural Comparison (2003) 16(4) *Ratio Juris*, pp. 433-449.

³⁰⁸ Indeed, as Zucca (2007, in paperback 2008, p. 12) states, balancing "is often perceived as the tool that can help us to solve all those tough constitutional problems, which include conflicts of FLRs. If we can't apply a norm straightforwardly without breaching another fundamental norm, then we can at least try to apply them both – albeit to a partial extent".

³⁰⁹ Bustamante (2007, p. 393) specifically suggests the following general directive for *prospective overruling*: D) In the presence of binding precedent or quasi-binding (binding *de facto*) of the superior courts, when a new decision revokes the case law previously established, the court may, in the presence of factors that could harm the most important principles of the legal system, such as the substantial justice or the legal certainty, modulate the conditions of temporal validity of the new case law. The author later specifies the directive through the following secondary conditions: D1) The more binding the old case law is, the more reasons for prospective overruling will exist; D2) The older the superseded case law is, the more reasons for the prospective effects of the new case law; D3) in all cases of prospective overruling, there must be a clear and justified decision on the subject, based on a deep weighting of the principles affected by the new decision, D4) the court should endeavour to justify in rational terms the decision on the effectiveness of rules that are pronouncing being pronounced.

The process to define the most valuable arguments, as Humberto Ávila³¹⁰ proposes, requires the division of them into two groups: institutional arguments and non-institutional arguments. The institutional arguments are divided into immanent arguments (linguistic and systematic) and transcendental arguments (historical and genetic). The immanent institutional arguments are extracted from the legal system, its textual and contextual language, its values and its systematic structure. The linguistic arguments are related to the meaning of the text of the norm. The systematic arguments are related to the analysis of the norm inside the broader context of the other provisions of the legal system. The transcendental institutional arguments are those that do not depart from the text of the legal norms or from other formal sources of the legal system. The transcendental historical arguments seek to relate the norm with the moment it was conceived while the genetic arguments consider the will of the Legislature, referring to information concerning the origin of the norms object of interpretation, such as the memorandum justifying the bill and the parliamentary debates, among others sources. Finally, there exist the non-institutional arguments, which are not related to any of the formal sources of the legal system. They appeal to other elements that are not essentially juridical. They are arguments, for instance, that rely on economic or political points of view. As examples, it is possible to mention a decision that does not give retroactive effects to the declaration of unconstitutionality to avoid possible individual actions against the state because this certainly would cause economical problems for the treasury.

According to the Brazilian Supreme Court, it is in the legal system that the parameters should be sought to weight the arguments in conflict. This means that the institutional arguments should always prevail. At the apex of the hierarchy of the law in the Brazilian legal system is the Constitution and it is there that the analysis should start. The contents of the norms invoked in the concrete case should be noted and seen if there is a hierarchy among the principles considered in the interpretation process. The Federal Constitution itself, when it establishes that some norms are fundamental and others not, suggests the existence of hierarchy within itself.

³¹⁰ Ávila, Humberto. Argumentação jurídica e a imunidade do livro eletrônico. *Revista Diálogo Jurídico*, Salvador, CAJ - Centro de Atualização Jurídica, v. 1, n. 5, agosto, 2001, pp. 2-18. <<http://www.direitopublico.com.br>> accessed 20 August 2011.

In this process of justification based on institutional arguments (taken from the legal system), the constitutional principles that are axiologically more relevant must prevail. With regard to the axiological hierarchy of principles in the Federal Constitution, the Supreme Court has recognised the prevalence of fundamental rights when in conflict with other constitutional provisions. The Constitution itself provides us with several indications of this, not only by calling them “fundamental” rights and principles, but also by elevating them to a condition of “*cláusulas pétreas*” (norms that cannot be changed). Besides, the Constitution also expressly establishes that those fundamental rights or principles, whose list is not exhaustive, have immediate application. When the interpretation of the concepts of legal certainty or exceptional social interest gives rise to a conflict that has on one side the fundamental rights of individuals, the Supreme Court has ruled in favour of the prevalence of these rights at the expense of other arguments that can be raised in the issue.

The pragmatic or consequentialist arguments can only be used to reinforce the institutional arguments already present in the case. The primacy of the rule of law in a state that describes itself as constitutional cannot be declined and for political and economic arguments a secondary place in the process of balancing arguments must be reserved. Indeed, the Federal Supreme Court has adopted the understanding of Rui Medeiros³¹¹ that the Court shall always justify the prospective effects of its decisions based on constitutional principles, that is, on juridical arguments and not on exclusively pragmatic arguments.

For instance, attempts to modulate the temporal effects in the decentralised review have appeared in cases of tax law. In these cases, on one side were the fundamental rights of liberty and propriety of citizens (article 5º, *caput*, II and XXIII, of the Federal Constitution) and, on the other, were the jurisdiction and the interests of the treasury to collect tax. Although the risk of insolvency of the treasury and the damage to the financial health of the State had been used as arguments to require the application of *ex nunc* effects, the declaration of unconstitutionality of the tax, in several cases the Supreme Court stated the prevalence of the rights of taxpayers to be taxed constitutionally, privileging the fundamental rights of the citizens and the principle of legality, upon the mere consequentialist arguments of the treasury. The

³¹¹ See Bustamante (2007, p. 394).

Supreme Court sustained the traditional theory of nullity and given retroactive effects to its decisions. On this topic, the following Supreme Court's extraordinary appeals can be mentioned: 273074/RJ³¹², 419905/PR³¹³, 456182/SC³¹⁴ and 553223/RJ³¹⁵.

In conclusion, it can be stated that retroactivity remains the rule concerning the temporal effects of the declaration of unconstitutionality; prospectivity, the exception. The Supreme Court, in interpreting article 27 of Law 9868/1999, has stated that the modulation of the temporal effects of its decisions cannot be admitted at the expense of the fundamental rights of the citizens. Legal certainty is a concept to be invoked in order to protect the rights of citizens and not to defend the interests of the State. Prospective effects must take place only after careful deliberation that concludes to safeguard the idea of legal certainty and other constitutional principles characterized as an exceptional social interest.

3.7 Law Reporting in Brazil

One of the requirements for the efficiency of a legal system based (even partly) on precedents is the existence of a safe and easily accessible method of reporting its case law.³¹⁶ Courts and lawyers who engage "in active practice are often

³¹² *Recurso Extraordinário* – RE-AgR 273074/RJ – STF – 2nd Panel – *Rapporteur* Justice Cezar Peluso – j. 21-8-2006 – DJe 036 de 28-2-2008 publ. 29/02/2009 – EMENT VOL-02309-02 pp. 00398.

³¹³ *Recurso Extraordinário* – RE-ED 419905/PR – STF – 1st Panel – *Rapporteur* Justice Carmen Lúcia – j. 28-10-2008 – DJe 241 de 18-12-2008 publ. 19-12-2008 – EMENT VOL-02346-10 pp. 02173.

³¹⁴ *Recurso Extraordinário* – RE-AgR 456182/SC – STF – 2nd Panel – *Rapporteur* Justice Joaquim Barbosa – j. 21-10-2008 – DJe 232 de 4-12-2008 publ. 5-12-2008 – EMENT VOL-02344-03 pp. 00495.

³¹⁵ *Recurso Extraordinário* – RE-AgR-ED 553223/RJ – STF – 2nd Panel – *Rapporteur* Justice Joaquim Barbosa – j. 19-08-2008 – DJe 241 18-12-2008 publ. 19-12-2008 – EMENT VOL-02346-13 pp. 02958.

³¹⁶ English law has developed its own peculiar law reporting system. In brief, it is composed of several collections of judicial decisions that are considered, for the purpose of the development of its law, as the most relevant. A case report contains the parties' names, demands, the decision made by the court and, above all, the reasoning upon which the decision has been based, the most important element of the decision for the purpose of the doctrine of precedent [see Ward, Richard. *Walker & Walker English Legal System* (8th ed, London, Butterworths, 1998), p. 62]. Historically, law reporting in England, apart from the "new" Neutral Citation, is mainly a private enterprise. As peculiar as it may seem, none of the many series of law reporting is considered to be official. The closest to being official is "The Law Reports", a collection published by the Incorporated Council of Law Reports for England and Wales, an independent, non-profit organisation. The first potential problem with this multi-private system is that the same case could be reported in more than one publisher with some relevant discrepancies. As a consequence of this, courts are sometimes oppressed by impertinent or inconsistent authority (see McLeod, 2011, p. 100). Some attempts already have been made to minimise this problem. For instance, Steiner (2006, p. 100) reveals that "the lord Chief of Justice issued, with immediate effect on 9 April 2001, a practice direction laying down a number of rules as to what material should be cited in court, and this with a view to limiting the citation of previous authority to cases that were relevant and useful to the court". It also occurs that in England not all judicial

extremely busy and lack the time to carry out elaborate research into every case”.³¹⁷ As reporting is a cornerstone of any system of precedents, it is fundamental to explain – and this is the aim of this Chapter’s final topic – how Brazil has created and developed a methodical system of case law reporting to deal with the millions of cases that are decided by its courts each year.

(i) Official and Non-Official Law Reporting

Brazil has dealt with law reporting for many years as a tool to present the Brazilian court’s understandings about legal issues. In spite of the great amount of decisions pronounced in Brazil³¹⁸, a sophisticated system – reliable and easily accessible – is being progressively developed with the decisive participation of the Brazilian courts and government bodies, as well as the private sector. Indeed, and different from England³¹⁹, law reports in Brazil are either officially delivered (by one of the several state or federal courts) or unofficially delivered (by a private publisher).³²⁰

The argument for official reports, mainly for all decisions of Brazilian superior and appellate courts, is very powerful. These are the most important decisions and they really build the Brazilian case law. They frequently establish new principles of substantive or procedural law or contain a modern understanding of an existing

decisions are reported. As it is impossible for the (private) publication of all cases that are decided in England, law reports become a matter of editorial discretion (see McLeod, 2011, p. 105). The most evident problem of editorial discretion in law reporting is that oversights inevitably occur. It can produce a problem of acknowledgment of some important judicial decisions and lawyers and courts have more difficulty finding and referring to these (unreported) precedents in current and future cases (see Zander, 2004, p. 319). The potential problem of acknowledging some relevant judicial decisions nowadays has been relieved, especially because, with the development of digital media and online legal databases, such as LEXIS, WESTLAW or BAILLI, only a few cases decided by the English superior courts are really not available to law professionals. However, the argument for official reports of all judgments of the English superior courts is very powerful (the Supreme Court and Court of Appeal, more precisely), as happens in the United States of America (see Black, 1990, p. 887).

³¹⁷ See Kiralf, A. K. R. *The English Legal System* (8th ed, London, Sweet & Maxwell, 1999), p. 85.

³¹⁸ Comparatively, the number of judicial decisions is supposed to be greater in Brazil than in England due to the greater population.

³¹⁹ Traditionally in England, apart from the “new” neutral citation system, the law reports are not official. Since 2001, the House of Lords (now the United Kingdom Supreme Court), Privy Council, Court of Appeal and High Court of Justice (partially since 2002) have been issuing decisions with neutral citations. Neutral citations identify decisions independently of any traditional series of reports. This can be seen as a step in the process of publicising the way of deliverance and citation of decisions in England. Decisions with neutral citations are freely available on the British and Irish Legal Information Institute website (www.bailii.org).

³²⁰ Similarly as in the USA, as Black says (1990, p. 887): “Law reports or reporters may be either official (published by the state or federal government) or unofficial (published by private publisher)”.

principle. They originally interpret statements of statutes, clarify a common clause in contracts or even resolve conflicting decisions of lower courts. They strongly affect the future of people, companies and the Government and, sometimes, even their pasts if the decision has retrospective effects. Obviously, decisions like these must be swift and very well reported.

In the Federal Court System, besides the decisions of the five Courts of Appeal³²¹, decisions of the District Courts (courts of first instance or inferior courts) are also reported, although only selectively. As a rule, in the federal states only the decisions of the appellate courts (the highest court of a state) are always reported. Full decisions of the several inferior courts are not usually officially reported, although they may appear in some official state press.

Brazilian courts have specialised personnel to revise their own decisions and reproduce all the necessary aspects of them. Full or (sometimes) concise texts of the decisions are published in the official press. These printed versions of the federal and state courts' decisions are published by the official press of the federal and the respective state governments. The problem of a lack of access to these reports is solved by the free online access to the decisions of the country's courts. Although oversights occasionally occur, Brazilian courts have developed a very good knowhow in delivering cases to be reported on with the support of electronic and online tools that are currently generally reliable, and hence accuracy and authenticity for case law is ensured.

On the other hand, the fact that there are official law reports does not forbid the existence of private publications. Some of them are even officially accredited by certain courts. Commonly, these private law reports have a commercial character. For these private reports, as happens in England, based upon their criteria (or according to their costumers' profiles), the editors in charge select the precedents which they believe to be the most appropriate. Furthermore, if everything that is in the official law reports is officially part of the decision, the same does not always occur with private law reports. In these publications, for instance, some "*ementas*" (a kind of summary of the case) are occasionally added by publishers in charge of them and these are not considered as an official part of the decision.³²²

³²¹ The "*Tribunais Regionais Federais*", which are the Brazilian equivalents to the American Federal Courts of Appeal.

³²² It is not the case of the official "*ementas*" which are officially part of the decision. These are also

The fact is, currently lawyers in Brazil often prefer to consult the official law reports (mainly the court's webpage), motivated by the fact that their publications are updated and their structure is very rational, not to mention that these law reports are online, which makes the search much easier.

(ii) Online Accessibility

The amount of cases decided in Brazil is immeasurable. Similar to England, due to this enormous quantity of cases it is extremely difficult to research and find the suitable precedent from the printed forms of any law report. To supersede this difficulty, Brazilian Courts (including the Supreme Court, the superior courts, the federal courts and several state courts) have systematically built computer and internet tools (on the court's official webpage)³²³ to satisfactorily manipulate and publish this huge amount of case data. Evidently, lawyers prefer to rely upon these online versions to obtain information faster and more safely.³²⁴

The many systems (although they are integrated, each court manages its own system) are based on the concept of free online access to the decisions. The idea is to classify the decisions of the court through a very sophisticated scheme of descriptors and numbers. The main points of the decisions are summarised into topics (short expressions or sometimes even a single key word). These decisions are saved in the online database linked with these descriptors (and also numbers) according to the scheme of classification. By searching for topics on the web pages, researchers can find cases related to issues of their interest. Identifying the case, they can consult the full version (or an abridged if preferred) of the decision on the same web page. Despite the possible failures of the system of classification, any experienced lawyer, when typing in any of these topics can, in a short time, put together several cases judged by a specific court (or some of them) on a certain

summaries of the judged cases but are produced by the court or judge responsible for the decision.

³²³ For instance: (i) the Federal Supreme Court (www.stf.jus.br); (ii) the Superior Court of Justice (www.stj.jus.br); (iii) the Federal Appellate Court for the 5th Region (www.trf5jus.br); and (iv) the Appellate Court of the State of Rio Grande do Norte (www.tjrn.jus.br). There is also an option – <http://www.jf.jus.br/juris/unificada> – that includes the decisions of the Federal Supreme Court and the Superior Court of Justice and of the all appellate courts of the Federal Courts System.

³²⁴ Similar to what happens in England and the USA with the development of computer based tools such as WESTLAW, LEXIS and BAILII.

point.³²⁵ This consulting method is fast and reliable in spite of the considerable amount of decisions pronounced. The various systems are also updated almost daily. Obviously, the reason for this daily updating is to make the precedents expeditiously available to the legal community.

(iii) The Content and Nomenclature of Cases

Generally, decisions, both on courts' web pages and in printed reports, are commonly delivered with the following data: (i) the data to indentify the case; (ii) a report of the events of the case, officially made by the judge who writes the decision, presenting the main points of the controversy and a summary of allegations presented for the court to consider, so that the decision of the court can be understood; (iii) the fundamentals, fully exposing the concrete judicial norms that were established; (iv) the proper decision of the judge or court; and (v) some additional data containing the name of the *rapporteur* of the decision, names of other judges that were on the bench, a reference to the unanimity of the decision or the dissenting opinions, among others.

Furthermore, there is a norm about nomenclature and citation of Brazilian case law that is mainly used in academic works. It is Norm NBR 6023/2002, issued by the Brazilian National Standards Organization (*Associação Brasileira de Normas Técnicas* – ABNT), a non-profit organisation which is responsible for technical standards in Brazil and is a founding member and the exclusive Brazilian representative in the International Organization for Standardization.³²⁶

It can be noted that, different from the Anglo-American approach, Brazilian cases are not designed by the names of the parties involved. But there can be

³²⁵ However, the Anglo-American citation indexes (which Shepard's Citation is the best known) are more sophisticated tools. They allow searching for other decisions which have already been cited or have interpreted the precedent systematically, that is, they allow (us) to know how this precedent was treated in later cases: from the original precedent it is possible to find a later case which cited it; from this later case, a subsequent case (which often only marginally refers to the original case) and so it goes on.

³²⁶ According to the norm, Brazilian judicial decision has to be identified as follows: (i) Brazil. (ii) Name of the Court. (iii) A summary (if officially there is one). (iv) Type (for example, appeal, *habeas corpus* or writ of *mandamus*) and the number of appeal. (v) Identification of the disputing parties. (vi) Name of *rapporteur* preceded by the word "*Rapporteur*" (vii) Date of the decision. (viii) Data of the publisher and the date. (ix) The word "unanimous" (if it was) or a reference to the dissenting opinions.

exceptions and the very controversial or famous cases inevitably became popularly known by the names or the issues involved in them.

Finally, despite the existence of a norm about the nomenclature of cases, it is usual to find cases quoted differently, without some of the recommend data or for them to be in a slightly different sequence. In fact, lawyers or courts in Brazil, based upon their preferences, have independently established their own rules of citation of precedents (before courts or in academic essays). It has been considered sufficient to label the cases by specific terms, abbreviations, numbers and dates that can easily identify them. The usual terms, not necessarily in the proposed sequence, are: the type of appeal in which the case was decided and a chronological number of identification given by the court, followed by the abbreviation of the name of the court that pronounced the decision, a reference to the panel that pronounced the decision, the name of the *rapporteur*, the expression “unanimous” (if it was), the date of the decision, as well as the date of the publication of the decision in the official press.

To summarise, this chapter has discussed the practical uses of precedents in Brazil under the traditional civil law perspective and compared them to the English model. Having fulfilled the purpose of addressing both the theoretical and practical traditional approaches to precedents in Brazil in Chapter 2 and Chapter 3, respectively, the following chapters will address the Brazilian categories of binding precedents that are expected to progressively transform the Brazilian legal system into an example of a mixed system.

4 A Proposed Taxonomy of the Brazilian Binding Precedents

Chapters 2 and 3 introduced a general picture of the manner in which the Brazilian legal system traditionally deals with precedents, identifying the basic differences and similarities between traditional common law and Brazilian law uses of them. As was seen, generally in Brazil previous judicial decisions (even pronounced by higher courts) are not binding precedents that must be followed by courts and judges. However, there are some departures of this general rule.³²⁷ This Chapter aims to address this aspect of Brazilian law, presenting a taxonomy of the several Brazilian categories of binding precedents.³²⁸

4.1 General Considerations

The traditional approach to precedents in Brazil can be summarised as follows: (i) the courts do not have to follow what other courts in the same hierarchical level have already decided or even have to follow their own previous decisions; (ii) the lower courts do not have to follow the previous decisions of the higher courts.³²⁹

However, it cannot be denied to binding precedents, especially when this expression is understood in its *lato sensu*³³⁰, a role in the Brazilian legal system. Indeed, in Brazil, challenging the traditional approach to the doctrine of the separation of power and aiming to achieve a standardisation of understanding relating to legal issues and to ensure speed in judicial decisions (at least these are the most apparent objectives), there are certain decisions or groups of decisions, as

³²⁷ Concerning similar sort of exceptionalities in France, see Steiner (2010, p. 89).

³²⁸ Apart from the Brazilian new model of Binding *Súmula* that will be analysed in Chapter 5.

³²⁹ See Ascensão (1994, p. 247).

³³⁰ The Brazilian peculiar binding precedents addressed in this Chapter are not judicial precedents in the *stricto sensu* (as applied in the Anglo-American *stare decisis* doctrine). They are results of diverse types of procedure, but each of them, in its own way, has a binding effect. For the purpose that of what follow in this chapter, sometimes the expression binding precedent, depending on the context, must understood in its widest meaning to encapsulate any sort of judicial decision/rule with a binding character. The goal here is to distinguish these judicial precedents “*lato sensu*” from the judicial precedent “*stricto sensu*” that can be defined, as Black (1990, p. 1176) does, as “an adjudged case or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law”.

a result of specific procedures, whose authority is binding on the law courts (sometimes for all, sometimes for some) and for the Administration as a whole. Specifically with regard to decisions made by the Brazilian courts – that, somehow, have a binding effect – it is possible to find categories ranging from the result of the incident for case law standardisation that internally binds a panel of a court, going through the decisions endowed with a binding effect on centralised control of constitutionality, going to quasi-legislative acts (such as the normative sentences of the Labour Courts).

It is not the intention of this thesis to address in details all these fields. It would be a futile task, especially for the purpose for which this thesis is proposed, which is (i) to present, compare (with the English approach) and systematise the concepts, the terms and the *modus operandi* of the doctrine of *stare decisis* as implemented in Brazil, and (ii) to present, compare (with the English approach) and analyse the new Brazilian binding precedent model, nominated “Binding *Súmula*”, something, indeed, unprecedented and that can be of considerable use to this field of law. The remainder of this chapter will deal with these Brazilian binding precedents separately, discussing the features of each particular category: (i) the Portuguese *Assentos*, (ii) the *Prejulgados* in Labour Courts, (iii) the Labour Courts “normative sentence”, (iv) the *Prejulgados* in Electoral Courts, (v) the normative power of the Electoral Courts, (vi) the general incident of standardisation of case law of the Code of Civil Procedure, (vii) the special incident of standardisation of case law of the Federal Small Claims Courts, (viii) the binding decisions in case of multiplicity of special appeals (that are appeals to the Superior Court of Justice) based upon a similar question of law, (ix) the incident to declare the unconstitutionality of a normative act in the context of the decentralised judicial review of legislation, (x) the binding decisions concerning the general repercussion (“*repercussão geral*”) in the extraordinary appeals (that are appeals to the Supreme Court) and (xi) the binding decisions on the centralised judicial review of legislation in Brazil. The aim is to expose their main aspects jointly with the details referring to the binding character that they have.

At the end of the Chapter, it will be present a table condensing the taxonomy achieved.

4.2 An Historical “Precedent”: the Portuguese *Assentos*

For historical purposes, a note is needed about the Portuguese *Assentos*, as they can be considered the first Brazilian experience with judicial decisions of binding effect.

A former Portuguese colony, Brazil, during the period of the Empire³³¹, recorded the existence of a kind of “judicial decision” whose characteristics, despite its peculiarities, has something in common with the doctrine of *stare decisis*: the *Assentos*. Of Lusitanian origin, its ancestry has generally been attributed to the ancient *Assentos* of the old *Casa de Suplicação*, the highest law court of the Portuguese Kingdom and, in principle, ruled by the King. These *Assentos* were created by the Manueline Ordinances of 1521 and maintained by the Philipines Ordinances, a tradition that was upheld and enforced with detailed regulation in the *Lei da Boa Razão* (Law of Good Reason) of 18 August 1769. During the period of the Empire, this ancient Portuguese practice was explicitly incorporated into Brazilian law by a General Assembly Resolution sanctioned by Decree 2684 of 23 October 1875, despite the strange implication that it would enforce a “binding law” from one country to another. More specifically, the Decree attributed status of “law” to the *Assentos of the Casa de Suplicação* of Lisbon issued between 1805 and the date of independence, as well as empowering the Brazilian Supreme Court to also issue its own *Assentos*.³³²

Neves details the main aspects of the *Assentos*: (i) the body that issues the *Assento* is a court (or body with a judicial function) and therefore is responsible in principle for the performance of a judicial function (even though this court is a Supreme Court), and operates in a particularly qualified manner (full bench); (ii) as a judicial body, it is required to deal with a conflict in the case law by means of a presentation of an appeal; (iii) it will consider and resolve the conflict through a truly judicial activity, pondering and deciding a concrete case; (iv) however, overcoming

³³¹ The first period of Brazilian independence, inaugurated in 1822 with Emperor D. Pedro I.

³³² See Sampaio (1985b, p. 12); Streck (1998, p. 79); Rocha, Carmen Lúcia. Sobre a súmula vinculante. *Revista de Informação Legislativa*, n. 133, jan./mar. 1997, p. 53; Rosas, Roberto and Aragão, Paulo Cezar. *Comentários ao Código de Processo Civil*, vol 5 (2nd ed, São Paulo, RT, 1998), pp. 63-64; Costa, Sílvio Nazareno. *Súmula vinculante e reforma do judiciário* (Rio de Janeiro, Forense, 2002), pp. 24-25; Souza, Carlos Aureliano Motta de. *O papel constitucional do STF: uma nova aproximação sobre o efeito vinculante* (Brasília, Brasília Jurídica, 2000), pp. 73 and 76.

the strict character of its judicial activity or at least not self-limiting to fulfil the function that the nature of the judicial activity corresponds to (the judicial decision of a concrete case), the judicial body establishes a judicial general norm – an *assento* – as a solution that no longer applies only to the concrete case but for future application.³³³

According to Neves, the *Assentos*, for their peculiar characteristics, differ from other categories of “binding decisions” that are present in other legal systems. To him, one cannot identify the model of the *Assentos* to the model of binding precedents, which exists in the common law legal systems. In the common law tradition, a precedent is a concrete judicial decision, necessarily linked to the concrete case (the fundamental facts) in which it was proffered, that is taken (or imposes) as a model for future similar cases. An *assento* goes beyond the concrete casuistic plan. Ultimately overcoming the strict character of a judicial activity, an independent abstract norm, detached from the concrete case, is created for future general application.³³⁴

The practice of *Assentos* went also beyond the limits of the doctrine of the separation of powers as it was (and is) understood in Brazil and Portugal (considering also that both are civil law countries). In fact, the configuration given to the *Assentos*³³⁵ conferred (i) to a law court the possibility to establish (ii) universally binding judicial statements that create (iii) norms in the strict sense of abstract and general precepts, that are (iv) abstract and become independent from the cases that have been their cause, with the purpose of establishing (v) a rule for future general application. Indeed, the issuing courts were called to proclaim legal criteria that both formally and intentionally have characteristics of legislative precepts.³³⁶ The *Assentos* did not have to address the conflict views in the cases, opting for only one of them, or to explain why to depart from a case law orientation previously followed. In this sense, they were not case law (understood here as a set of solutions that

³³³ In the most prestigious book on the subject: Neves, A. Castanheira. *O instituto dos assentos e a função jurídica dos supremos tribunais* (Coimbra, Coimbra, 1983), pp. 274-275.

³³⁴ See Neves (1983, pp. 11-12).

³³⁵ Even considering its more recent configuration in article 2 of the Portuguese Civil Code of 1966.

³³⁶ See Neves (1983, pp. 2-5). By the same author, see also Neves, A. Castanheira. *O problema da constitucionalidade dos assentos (Comentário ao Acórdão n. 810/93 do Tribunal Constitucional)* (Coimbra, Coimbra, 1994).

come from the past and persist). They really were norms deliberately formulated for the future.³³⁷

With the proclamation of the Republic and the natural tendency to cut links with Portugal, the *Assentos* were abolished in Brazil by the Constitution of 1891.^{338,339}

4.3 Binding Precedents in Labour Courts

(i) *The Prejulgados*

The Portuguese *Assentos* did not represent an epilogue in the Brazilian binding precedents history. Yet during the first half of the 20th Century, the *Prejulgados* of Labour Courts – an assemblage of binding statements dealing individually (a single *Prejulgado*) with questions of labour law – were created by article 902 of the Brazilian Consolidation of Labour Laws³⁴⁰ (with the text amended by Decree-Law 8737/46). According to Decree-law 8737/46, the Superior Labour Court was permitted, in conformity with its Internal Regulations, to establish *Prejulgados* that would have bindingness in relation to the other labour courts. They could be also revoked or reformed by the full bench of the Superior Labour Court, pronouncing in abstract or in a concrete case.

The greatest problem was that, if by the terms of the Decree-Law, only the reform or revocation of the *Prejulgados* could be made in abstract (i.e. in the absence of a concrete case), it would not be done in that manner. In fact, the internal

³³⁷ See Neves (1983, pp. 11-12).

³³⁸ See Rosas and Aragão (1998, p. 64). See also Tucci, Rogério Lauria. *Curso de direito processual civil*, vol 3 (São Paulo, Saraiva, 1989), p. 167.

³³⁹ In Portugal, curiously, until the 1990's, after advances and setbacks, according to article 2 of the Civil Code of 1966, the high courts were able to establish, via *Assentos*, a doctrine of generally binding power. Much was discussed in Portugal about the *Assentos* in relation to their true nature (judicial or quasi-legislative) and their constitutionality, as mentions Costa (2002, pp. 26-36). A consensus was only achieved when the Portuguese Constitutional Court, through Decision 810/1993 (in Case 474/1988) declared the unconstitutionality, in part, of article 2 of the Civil Code. During 1995 and 1996, the Portuguese civil procedure was reformed and article 2 of the Civil Code in the non-unconstitutionalised part was repealed by article 4, n^o 2, of Decree 329-A/95. While repealing article 2 of the Civil Code, the reform of 1995-96 provided a specific mechanism for the standardisation of the case law of the Supreme Court, establishing an expanded panel to deal with the issue (articles 732-A e 732-B of the Code of Civil Procedure). To the *Assentos* that had already been issued was attributed the value of a decision pronounced in the mechanism for the standardisation of the case law of the Supreme Court in the terms of articles 732-A and 732-B. See Mendes, Armino Ribeiro. *Os recursos no Código de Processo Civil revisto* (Lisboa, LEX, 1998), pp. 101-102.

³⁴⁰ Decree-Law 5452/1943.

regulations of the Superior Labour Court also permitted the creation of the *Prejulgados* in the absence of a concrete case. The Superior Labour Court on several occasions acted as such.^{341,342,343}

The constitutionality of the *Prejulgados* was powerfully contested. It was said that the ordinary Legislature could not grant power to a court (even a superior court) to issue “judicial norms” and bind the lower courts. Certainly, this was the case of the *Prejulgados*: the ordinary Legislature giving power to the Judicial Branch to “legislate”, which, as it is known, is a typical function of the Legislature. The Decree-Law clearly offended the principle of the separation of powers of the Brazilian Republic, which, pursuant to article 2º of the Federal Constitution, are independent and harmonious.³⁴⁴

Despite this evident flaw, the *Prejulgados* survived for many years, passing through three constitutions. In 1977, based on the arguments cited above, the Federal Supreme Court declared them unconstitutional. In 1982, Law 7033/1982 was issued, which eventually suppressed the *Prejulgados* of the Brazilian law.³⁴⁵

(ii) Labour Courts Normative Sentence

Despite the *Prejulgados* no longer surviving, there still exists in Brazilian Labour Courts a kind of decision that has a very heterodox type of bindingness to a judicial decision. It is the “normative sentence” that is regulated in articles 868 to 871 of the Consolidation of Labour Laws (Decree-law 5452/1943). In summary, an appellate Labour Court (and, at national level, the Superior Labour Court), in case of collective disputes, may establish new labour conditions and extend these conditions to all employees of the company in the same profession, even those that do not

³⁴¹ See Sampaio (1985b, p. 14).

³⁴² According to Sampaio (1985b, pp. 14-15), the type of binding precedent most similar to the *Prejulgados* was the *arrêt de règlement des Parlements* of France's old regime, which was issued regardless of the concrete case to be judged, and then assembled into collections called *placita*.

³⁴³ To the current French approach to the *arrêt de règlement*, see Steiner (2010, specially pp. 88-89 and 103).

³⁴⁴ See Martins, Nei Frederico Cano. A súmula vinculante no âmbito trabalhista. *Repertório IOB de Jurisprudência: trabalhista e previdenciário*, n. 22, 2ª quin. nov. 1996, pp. 383-386.

³⁴⁵ According to Martins (1996, p. 385), after this repeal, considering that the content of the *prejulgados* continued to reflect consolidated views on the interpretation of Brazilian labour law, the Superior Labour Court, through Administrative Resolution, transformed them into *enunciados* (statements) of its *Súmula*.

participate in the bargaining. The extension may still be larger, covering all employees of the same professional category within the jurisdiction of the court, provided it fulfils the requirements of articles 869 and 870.³⁴⁶ It is said that the normative sentence produces *ultra partes* effects, limited to the employees of a professional class in the territorial jurisdiction of the court, somehow anticipating the similar effect presented in the United States with class actions, although with other desiderata.³⁴⁷

Consequently, the normative sentence binds the inferior courts, which must appreciate further individual actions in accordance with earlier provisions in the normative sentence. It is, therefore, a decision that does not follow the lines of a classical judicial decision, whose binding effects only reach the parties involved.

By containing general and abstract commands, almost matching the activity of legislation (almost, because the effects are not as general and abstract as those of the statutes in *stricto sensu* are), the constitutionality of the normative sentence was vigorously discussed in the past (before the Constitution of 1946, precisely). However, currently, there is no more space for this discussion. It is only necessary to consult article 114 and article 5º, XXI, of the 1988 Constitution, to see that it has recognised the existence of the normative sentence.

4.4 Binding Precedents in Electoral Courts

(i) The Prejulgados

Electoral courts also had a type of *Prejulgados*. According to Brazilian Electoral Code (Law 4737/1965, article 263), during a single electoral period, the previous decisions on questions of law constitute *Prejulgados* (binding precedents) to further similar cases, unless, against the previous decision, there are the votes of two thirds of the member of the Court.

The desiderata of the electoral *Prejulgados* were to ensure the uniformity in the interpretation of the electoral law. They had, as objective limits, the question of law decided, which constituted a binding precedent to the court at the judgement of

³⁴⁶ See Sampaio (1985b, p. 10).

³⁴⁷ See Lacerda, Galeno. O juiz e a justiça no Brasil. *Revista de Processo*, v. 16, n. 61, jan./mar. 1991, p. 173.

similar cases during the very same election. They did not involve questions of fact. More restricted than labour *Prejulgados*, they had a very definite time limit. They only bound the further cases of the same election. A *Prejulgado*, decided in relation to an election, did not bind questions pertaining to another election.³⁴⁸ It also had, according to a literal interpretation of the legal text, a bindingness limited to the court that issued it.

Recently, they have lost their practical interest (keeping the historical interest, certainly) because the Superior Electoral Court considered article 263 of the Electoral Code, which created the electoral *Prejulgados*, with respect to their bindingness, as incompatible “with the subsequent Constitutions”³⁴⁹, including, evidently, the current Federal Constitution.³⁵⁰

(ii) The Normative Power of the Electoral Courts

The normative power of the Electoral Courts is now exercised through resolutions, which are almost “legislative” acts issued by the Superior Electoral Court or by the Regional Electoral Courts on any question of electoral Law, such as eligibility, coalitions of parties, surveys, advertising and voting. The issuing of resolutions is often provoked. In fact, the Superior Electoral Court (Electoral Code, article 23, XII) and the Regional Electoral Courts (Electoral Code, article 30, VIII) are empowered to respond to what has been called for consultations. These are questions in abstract – never a concrete case – on certain point of electoral law. The answers to them are also given in abstract, through resolutions, that is, as normative acts of the Electoral Courts.

The dominant understanding in Brazil is that, in being a normative act of the Electoral Courts, the resolution must have a binding effect to the court which delivered it and for the lower courts and judges (in the same jurisdiction). Indeed, the answer to a consultation would make no sense if thereafter not followed by the Court itself, when presenting the same question in concrete case. As Sampaio states, “it

³⁴⁸ Costa, Tito. *Recursos em matéria eleitoral* (4th ed, São Paulo, RT, 1992), p. 75.

³⁴⁹ The Electoral Code was issued under the Brazilian Constitution of 1946. The subsequent Constitution is of 1967 and the current constitution is of 1988.

³⁵⁰ See *Recurso Especial* – Resp 9936/RJ – TSE – *Rapporteur* Justice Sepúlveda Pertence – DJ 10-3-1993 p. 3478.

would be disconcerting irony, during a concrete case in which is discussed the meaning of a normative act, to give a solution different from that established in a resolution".³⁵¹ If delivered by the Superior Electoral Court, the resolution will bind all Regional Electoral Courts and electoral judges; if given by a Regional Electoral Court, it will bind itself and the electoral courts in its jurisdiction. It could not be otherwise, defends the majority in Brazil, and this normative character is for the Electoral Courts as the Binding *Súmula* of the Federal Supreme Court is to all courts.

There are those who think differently. Jardim, for example, complaining of the absence of the perfect adversarial proceeding and of a concrete case, argues there is no bindingness in the answers to the consultations. For him, the Electoral Code, requiring the judges and inferior courts to decide according to a predetermined abstract judicial interpretation, disregarding the circumstances and peculiarities of the concrete case, under Brazilian constitutional model of separation of powers, is unconstitutional.³⁵²

Constitutional or not, in practice, the bindingness exists, especially referring to the answers given by the Superior Electoral Court to the consultations addressed to it. Taking in consideration the Brazilian reality, it is never too much to remember the natural peculiarities of an electoral proceeding, which is much more judicial administration of paramount questions (the elections of the country) than jurisdictional activity itself: maximum speed, convenience of reducing disputes and the need for the democracy of a predictability of what the law is, among others.³⁵³ These peculiarities forged the existence of the consultations and the resolutions. And, actually, the resolutions are invariably followed (at least until a new response is given) by the Superior Electoral Court, the regional courts, judges, parties and candidates, based much more on the certainty of the futility of opposing to an understanding of a superior or regional court, during time of electoral proceeding (expedited by nature), than on the knowledge of the existence of a binding effect (whether it constitutionally exists or not).

³⁵¹ Sampaio (1985b, p. 16).

³⁵² Jardim, Torquato. *Direito eleitoral positivo* (2nd ed, Brasília, Brasília Jurídica, 1998), pp. 184-185.

³⁵³ *ibid.*, p. 1982.

4.5 Incidents of Standardisation of Case Law³⁵⁴

(i) *The General Incident of Standardisation of Case Law of the Code of Civil Procedure*

The Brazilian Code of Civil Procedure (articles 476 to 479) regulates an incident to the standardisation of the case law within the same court. Its name clearly reveals the concern of the Code in maintaining the uniformity of the case law within the same court. It also aims to avoid that the fate of the litigants be under the dependence of the distribution of the case to this or that panel.^{355,356}

Its proceeding is, in summary, as follows: during the trial in a panel, if it is observed that the court has previous conflicting decisions on the same question of law, this question of law can be, on the request of one party, the Prosecution Service³⁵⁷ or even on the initiative of the panel itself, submitted to the analysis of the full bench, the special court or the great civil panel;³⁵⁸ the trial at the panel is halted until the full bench (or the pertinent standardisation organ) decides the incident; once the incident is decided, its result will be applied, then, bindingly, in decision of the concrete case by the panel.^{359,360}

It is worth stating that the pronouncement of the full bench (or the pertinent standardisation organ), at the incident, will concern only the question of law or, by using the wording of the Code, will concern “the interpretation of law”³⁶¹, and not the

³⁵⁴ Procedures for preliminary ruling, similar to that of article 234 of the EC Treaty, to prevent divergent interpretations and ensure the uniform application of law. Shortly, by using these procedures a court panel turns to a standardisation organ and ask it to clarify a point concerning the interpretation of the law.

³⁵⁵ See Mendes, Francisco de Assis Filgueira. *A uniformização da jurisprudência*. *Revista da Faculdade de Direito da Universidade Federal do Ceará*, n. 31, jan. /jun. 1990a, p. 171

³⁵⁶ See also Wambier, Teresa Arruda Alvim. *Controle das decisões judiciais por meio de recursos de estrito direito e de ação rescisória* (São Paulo, RT, 2001), p. 331.

³⁵⁷ In this regard, there are some opinions *in contra*.

³⁵⁸ One cannot state *a priori* which body should have the function to standardise. Each court will state this in the internal regulation. However, it is possible to outline the co-ordinates. In courts where there is a unique great civil panel, it is the body naturally indicated to standardise the case law in civil matters”; when it is not the case, the power shall be of the full bench or the special court. See Sanches, Sydney. *Uniformização de jurisprudência* (São Paulo, RT, 1975), pp. 28-29.

³⁵⁹ See Rocha, José de Albuquerque. *O procedimento da uniformização da jurisprudência* (São Paulo, RT, 1977), p. 126.

³⁶⁰ See also Wambier (2001, p. 333).

³⁶¹ As say Wambier (2001, p. 332) and Rosas and Aragão (1998, p. 26), the pronouncement of the

facts of the concrete case. Concerning the facts, the panel will then decide, already bound to the interpretation given to the question of law by the standardising body. Indeed, the panel will decide the appeal, but it will be bound to the interpretation of law established by the full bench.^{362,363} Besides, article 479 of the Code of Civil Procedure states that the decision of the incident approved by the absolute majority of the members of the court, will be incorporated in the *súmula* of the court and, internally, will constitute, a binding precedent.

In accordance with the above, the full bench (or the pertinent standardisation organ) interpretation by absolute majority produces a double order of effects: it must be observed by the panel in the decision of the concrete case (article 478) and constitutes, to the court, a binding precedent for further cases (article 479).³⁶⁴

Regarding the first effect (of article 478 of the Code of Civil Procedure), subjectively speaking, the decision of standardisation binds the panel that will decide the appeal, or the cause that served as the presupposition of the request for standardisation. Its material validity amounts to the concrete facts on which the appeal or the case is based, meaning that it applies to such facts. With these characteristics it can be classified as a specific precedent, since it limits its authority to the case in question and to the organ empowered to decide it.³⁶⁵

Referring to the second effect – the understanding of the standardisation organ as a binding precedent for future cases within the same court – it is also possible to establish its features. Subjectively speaking, article 479 states that the decision will constitute a precedent in the standardisation of the case law of the court. Consequently, the understanding of the standardisation organ binds the Court (and certainly its panels and judges) that produces it.³⁶⁶ Concerning the material ambit of the second effect, the understanding proclaimed by the court, as article 479 determines, is not only applicable to the concrete case, but equally, as a binding

standardisation organ, which is claimed through the incident of standardisation of case law, must be, necessarily, on a matter of law, but not necessarily concerned to the merits of the cause or even to questions of substantive law. Indeed, the raising of the incident is possible with regard to a question of procedural law.

³⁶² See Brazilian Code of Civil Procedure, article 478.

³⁶³ See also Nery Júnior, Nelson. *Código de Processo Civil comentado e legislação processual civil extravagante em vigor* (11th ed, São Paulo, RT, 2010), pp. 797-795.

³⁶⁴ See Rocha (1997, p. 78).

³⁶⁵ *Ibid.*, pp. 78-79.

³⁶⁶ *Ibid.*, p. 79.

precedent, to all similar cases that may arise before the court in the future, unless the court exercises its power to repeal it. One can say that the “the interpretation of law”, as a binding precedent to further cases, is a quasi-general norm as to the conditions of application, since it imposes consequences in a generic way, opening the possibility that an undetermined number of identical cases can be subsumed within the generality of its terms.³⁶⁷

Currently, in Brazil, there is no disagreement about the constitutionality and appropriateness of the second effect (the bindingness to other cases in the same court when the same question of law is discussed). The court is only one body, though divided, for functional reasons, into smaller panels. These panels (and the judges, individually) must therefore follow the understanding of the court as a whole, represented by the decision of its full bench (or the pertinent standardisation organ) in the precedent of standardisation of case law.

(ii) The Special Incident of Standardisation of Case Law of the Federal Small Claims Courts

Law 10259/2002, which regulates the proceedings in the Federal Small Claims Courts, states, in its article 14, *caput*, that a request for standardisation of interpretation of federal law will be required when there are divergent interpretations on matters of substantive law in decisions pronounced by appellate panels.

The objective of this incident is the same as the incident of the Code of Civil Procedure. Besides, referring to the means of operation, it must follow the same *modus operandi* stated by the Code of Civil Procedure (articles 476 to 479) with the necessary adaptations (the provisions of the Code of Civil Procedure applies subsidiarily to the Federal Small Claims Courts when not inconsistent with Law 10259/2002).³⁶⁸

In fact, if during the trial of a concrete case before an appellate panel is observed that there are conflicting decisions on the same question of substantive law, this question, by request of a party, the Prosecution Service or even *ex officio*, is to be submitted in advance to a standardising organ. The trial before the appellate

³⁶⁷ *Ibid.*, p. 80.

³⁶⁸ See Wambier (2001, p. 333).

panel is suspended until the standardising body decides the incident. Once the incident is decided, the appellate panel that has to decide the concrete case will directly apply the result, bindingly.³⁶⁹

According to Law 10259/2002, this incident of standardisation of case law will be decided: (i) if based on a divergence between panels of the same region, by a joint meeting of panels in conflict, chaired by a co-ordinating judge (article 14, § 1º); (ii) if based on a divergence between panels of different regions or on a decision in opposition to the dominant case law or the *Súmula* of the Superior Court of Justice, by a National Standardisation Panel, comprising of judges of all appellate panels, chaired by a Federal Co-ordinator (article 14, § 2º). Exceptionally, the interested party may request a further decision of the Superior Court of Justice, when the orientation stated by this decision of the Standardisation Panel, in matters of substantive law, is contrary to the dominant *Súmula* or the case law of that court (article 14, § 5º).

The pronouncement of the standardising organ on this incident must be, according to Law 10259/2002, on a question of substantive law and not on the facts of the concrete case. Indeed, it will be the appellate panel that, bound to the interpretation (about the question of substantive law) given by the standardising organ, shall decide on the facts and the concrete case as a whole. It is very important to observe that the object of this incident of standardisation is more limited than that of its counterpart of the Code of Civil Procedure, since it deals only with questions of substantive law, unlike that which can also consider the questions of procedural law.³⁷⁰

Following the example of the Code of Civil Procedure, the decision of the incident of standardisation in the Federal Small Claims Courts must also produce a double-order of effects. Firstly, it should be observed by the respective appellate panel in the decision of the concrete case. Secondly, to make sense to the incident, the legal interpretation established by the National Standardising Panel (§ 2º) and the Superior Court of Justice (§ 4º) must bind the decision of new cases to what has been discussed of the same question of substantive law. It is a matter of common sense and economy, as it would be unreasonable to decide to the contrary or even

³⁶⁹ *Ibid.*, p. 333.

³⁷⁰ See Wambier (2001, p. 332).

raise a new incident in each new trial that conveys the same question of substantive law, when this question is already nationally decided (by a procedure specifically created to do so).³⁷¹

In truth, Law 10259/2002 does not mention this bindingness to the decision of the National Standardising Panel. It mentions (and only implicitly) to the case of the envoy of the discussion to the Superior Court of Justice. According to § 5º of article 14, in the case of envoy of the discussion to the Superior Court of Justice, the *Rapporteur* may concede *ex officio* or at the request of the interested party, a preventive measure determining the suspension of the cases in which the same divergence is established. And following this, § 6º concludes that any eventual requests for identical standardisation, subsequently received in any appellate panel, will be suspended, waiting for the pronouncement of the Superior Court of Justice. The expression “waiting” implies the necessary application of the understanding of the question of substantive law that will come from the pronouncement of the Superior Court of Justice. However, it is necessary to give meaning to the incident of standardisation in the Federal Small Claims Courts. Simply binding the appellate panel to the interpretation given (by the National Standardising Panel or the Superior Court of Justice) in the specific concrete case is to destroy the most practical and important effect of the incident. The key to making sense of this incident is to nationally bindingly apply the understanding for cases in which the same question of substantive law will be discussed, thus ensuring the uniformity that is so desired.³⁷²

4.6 The Case Multiplicity of Special Appeals Based upon a Similar Question of Law

A new rule of binding precedents was created by Law 11672/2008, which established a new proceeding to the case of multiplicity of special appeals (“*recurso especial*”), addressed to the Superior Court of Justice (but filed before a Federal Regional Court or a State Court of Justice), based upon a similar question of law. In what clearly is one more effort of the Brazilian legal system to make justice faster, the new law intends to expedite the processing of these several similar special

³⁷¹ See Souza (2006, pp. 246-247).

³⁷² *Ibid.*, pp. 247-248.

appeals. It added article 543-C to the Civil Procedural Code and therefore allows these special appeals with identical law theses to be solved in the ordinary instances without being analysed by the Superior Court of Justice.

In summary, the new article 543-C, § 1º, of the Civil Procedural Code determines that, once a great amount of special appeals concerning the same matter are verified, the president of the court of appeal – a Federal Regional Court or a State Court of Justice – will be in charge of admitting one or more appeals that represent the controversy, which will be forwarded, by sampling, to the Superior Court of Justice. The proceedings of the other similar special appeals will be pending, waiting for a decision of the Superior Court of Justice. If this step is not taken by the Presidency of the Federal Regional Court or the State Court of Justice, the *rappporteur* of a similar special appeal in the Superior Court of Justice may identify this situation and order the suspension, in the court of origin, of the proceedings of those special appeals based upon the same question of law (§ 2º of article 543-C).

The new rule also determines that the exemplary appeals will be expeditiously sent to trial and, most importantly, after the Superior Court of Justice's decision on the appeal(s) addressed to it by sampling, the courts of origin must apply this decision to other pending cases. According to the Civil Procedural Code, article 543-C, §7º, I and II, once the ruling of the Superior Court of Justice has been published: (i) if the final understanding of the Superior Court of Justice coincides with the appealed decision, the special appeals discontinued at the origin will be definitively dismissed there (in the Federal Regional Courts or in the State Courts of Justice); (ii) if the final understanding of the Superior Court of Justice differs of the appealed decision, the courts of origin (Federal Regional Courts or State Courts of Justice) will re-examine their decisions taking into consideration the understanding of the Superior Court of Justice.

There is a slight difference between items I and II of the above mentioned §7º of article 543-C of the Civil Procedural Code that should be made clear. Item II basically says that the courts of origin (Federal Regional Courts or State Courts of Justice) will re-examine their decisions (taking into consideration the understanding of the Superior Court of Justice). The most common interpretation of this provision is that the courts of origin are not strictly bound by the understanding of the Superior Court of Justice. Truly, there is a strong recommendation in following the Superior

Court of Justice's precedent but not a strict bindingness. Regarding item I of §7º of article 543-C of the Civil Procedural Code, the rule is cogent, and the similar special appeals should inevitably be dismissed at the origin.

Interestingly, on its website³⁷³, the Superior Court of Justice keeps track of the special appeals that have been affected the quality of paradigm for other special appeals based upon a similar question of law. The Federal Regional Courts, the State Courts of Justice or any lawyer can easily see their progress and what has been decided on the several matters.

Finally, it is important to note that this innovation for the special appeals encompasses two trends in the Brazilian procedural law. Firstly, following the current tendency in Brazil of establishing more and more cases of binding precedents, it is remarkable that the Brazilian legal system provides one more case of an external binding precedent, since the Federal Regional Courts and the State Courts of Justice are bound by (or at least constrained to follow in case of item II of §7º of article 543-C of the Civil Procedural Code), in pending cases, the understanding established by the Superior Court of Justice. Secondly, in line with the creation of the general repercussion for extraordinary appeals to the Federal Supreme Court (which will be seen later in this chapter), the new proceeding for the special appeals based upon a similar question of law is an attempt to relieve the Superior Court of Justice so it can focus on, with more quality and speed, what it considers the most important issues.³⁷⁴

4.7 Binding Precedents in the Context of the Judicial Review of Legislation in Brazil

4.7.1 An Overview of the Judicial Review of Legislation in Brazil

Currently, under the Constitution of 1988, Brazil adopts the two main models of judicial review of legislation: the decentralised, as in the American model, and

³⁷³ That is www.stj.jus.br.

³⁷⁴ See Souza (2012, pp. 181-183).

centralised, the model developed in continental Europe.^{375,376,377} These two models, as they coexist in Brazil, are quite distinct in terms of intervention and powers.^{378,379}

Basically, following the American model, the decentralised control (i) is that entrusted to all judges and courts of the country;³⁸⁰ (ii) is concrete because the judge decides by exception when applying the law to a particular case;³⁸¹ (iii) and is a *posteriori* because the control refers to a law that has already been promulgated. Evidently, in Brazil decentralised control has its own additional particularities, which are, in summary, the following: (i) any judge or collegiate court (these only by the absolute majority of its members or members of the respective special body - article 97 of Brazilian Constitution) may declare the unconstitutionality of laws or normative acts; (ii) a declaration of unconstitutionality may be required in any case, by either party, by way of exception in the discussion of the concrete case; (iii) as a direct and immediate effect, the non-application of the norm considered as unconstitutional is only in the concrete case discussed in court (*inter partes* effects); (iv) as an indirect and mediate effect, emerges the power of the Senate to suspend the execution, in whole or in part, of a law or a normative act that is declared unconstitutional by

³⁷⁵ About the European model, see Rousseau, Dominique. *La justice constitutionnelle en Europe* (3rd ed, Paris, Montchretien, 1998), pp. 13-14. Concerning also its transplant to Brazil, see Streck, Lênio Luiz. *Jurisdição constitucional e hermenêutica: uma nova crítica do direito* (Porto Alegre, Livraria do Advogado, 2002), p. 285.

³⁷⁶ Concerning the European Model versus the American Model, see Sweet, Alec Stone. *Governing with Judges: Constitutional Politics in Europe* (Oxford, Oxford University Press, 2000), pp. 32-34.

³⁷⁷ Curiously, the Portuguese system of judicial review of legislation also encompass the diffuse and concentrated models of control in a particular combination, characterised by the fact that, despite the existence of a Constitutional Court, all courts are constituted in actual organs of constitutional justice, since they can also make the judicial review. See Almeida, Luís Nunes. Portugal. In Aja, Eliseo (ed). *Las tensiones entre el Tribunal Constitucional y el Legislador en la Europa actual* (Barcelona, Ariel, 1998), p. 207. Concerning the judicial review of legislation in Portugal, see also Miranda, Jorge. *Manual de Direito Constitucional*, t. 2 (2nd ed, Coimbra, Coimbra, 1988); Canotilho, José Joaquim Gomes. *Direito Constitucional* (6th ed, Coimbra, Almedina, 1993); Canas, Vitalino. *Introdução às decisões de provimento do Tribunal Constitucional* (2nd ed, rev, Lisboa, Associação Acadêmica da Faculdade de Lisboa, 1994).

³⁷⁸ See Barroso (2004, pp. 60-62).

³⁷⁹ Concerning the forms of Constitutional Review in "Third Wave" democracies, including Brazil, see interesting comparative table in Ginsburg, Tom. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge, Cambridge University Press, 2003), pp. 7-8.

³⁸⁰ About the distinctions between "ordinary justice" and "constitutional justice", see Heuschling, Luc. Justice constitutionnelle et justice ordinaire: Épistémologie d'une distinction théorique. In Grewe, Constance et al. *La notion de «justice constitutionnelle»* (Paris, Dalloz, 2005), pp. 85-112.

³⁸¹ With regard to exceptional hypotheses of abstract judicial review of statutes in the United States of America, see: Shapiro, Martin and Sweet, Alec Stone. *On Law, Politics, and Judicialization* (Oxford, Oxford University Press, 2002), pp. 234-375.

definitive decision of the Federal Supreme Court (see article 52, X, of Brazilian Constitution); (v) finally, in accordance to the reformed text of Brazilian Constitution (article 103-A, altered by Constitutional Amendment 45/2004), it is allowed to the Federal Supreme Court, in the decentralised judicial review of legislation, by decision of two thirds of its members, after repeated similar decisions on the same constitutional matter, to approve a statement (on this matter) to be incorporated in its Binding *Súmula* that, by its publication in the official press, will have to be followed by the other judicial courts and the public Administration as a whole, at federal, state and municipal levels.³⁸²

In parallel, Brazil also adopts the European model of judicial review. In this modality, the control (i) is centralised in the Brazilian Supreme Court^{383,384} (at federal level),^{385,386} (ii) is done in abstract because the Supreme Court decides regardless of any concrete case and (iii) *a posteriori* because control refers to a law that has already been promulgated.³⁸⁷ This centralised control is operated in Brazil through direct actions. The two most important actions, which are presented before the Federal Supreme Court, are: (i) the direct action of unconstitutionality of a federal or state law or normative act (see Brazilian Constitution, article 102, I, “a”, first part);

³⁸² See Souza (2006, pp. 206 and 263-265).

³⁸³ The Federal Supreme Court is the Brazilian “Constitutional Court”.

³⁸⁴ Comparatively, concerning the composition, recruitment and review authority of the French and German Constitutional Courts, for instance, see interesting table in: Shapiro and Sweet (2002, p. 186).

³⁸⁵ In Brazil, similar to what occurs in Germany, for instance, the concentrated control of constitutionality has place before the Supreme Court, when the law or normative act (federal and state) is contested in the face of the Federal Constitution, and before the Appellate Courts of the Federal States (called “*Tribunais de Justiça*” by the Federal Constitution), if the contestation is performed in the face of the respective state Constitutions (considering only state and municipal laws or normative acts). However, the concentrated control in the states does not interest us for the purposes of this study, since, in this state control, when the normative act also challenges the Federal Constitution, the decision given by the state Court will not exhaust the issue. This is because an extraordinary appeal (from the State Court to Federal Supreme Court) is possible or because, in parallel, a direct action may have been filed before the Federal Supreme Court. This Court, in both cases, is who will give the final decision. Without disregarding the constitutional role of the state Courts in the subject of concentrated control (whose decisions can even have binding character in certain cases), outweighs the burden of the Supreme Federal Court concerning the creation of binding precedents in judicial review of legislation. In fact, only in relation to the decision of the Supreme Court, that declares the constitutionality or unconstitutionality of a norm, all other courts and the Administration as a whole are, in all cases, actually bound.

³⁸⁶ With regard to the Constitutional Justice in a federal system, see Beaud, Olivier. De quelques particularités de la justice constitutionnelle dans un système fédéral. In Grewe, Constance et al. *La notion de «justice constitutionnelle»* (Paris, Dalloz, 2005), pp. 49-72.

³⁸⁷ See Cunha Júnior, Dirley da. *Controle de constitucionalidade: Teoria e Prática* (Salvador, JusPODIVM, 2006), pp. 151-152.

and (ii) the declaratory action of constitutionality of a federal law or normative acts (article 102, I, “a”, second part).³⁸⁸ The decisions pronounced by the Federal Supreme Court in direct actions of unconstitutionality and declaratory actions of constitutionality have force against all, as well as a binding effect in regards to the other judicial courts and the Administration as a whole.

4.7.2 The Incident to Declare the Unconstitutionality of a Normative Act in the Context of the Decentralised (“*Difuso*”) Judicial Review of Legislation

An incident very similar to the incident of standardisation of case law of the Code of Civil Procedure, in the operation of its internal binding, is the incident to declare, in collegiate courts, the unconstitutionality of a normative act in context of the decentralised judicial review of legislation. In accordance with article 97 of the 1988 Federal Constitution, only by the vote of the absolute majority of its members or the members of the respective special body may the Brazilian collegiate courts declare the unconstitutionality of a statute or normative act.

This incident is regulated in articles 480 to 484 of the Code of Civil Procedure. In short, once argued and upheld in a panel the unconstitutionality of a normative act, the analysis of this question must be submitted to the full bench of the court (or the special body). The trial at the panel will be suspended until the full bench (or the special body) decides the constitutional question. The pronouncement of the full bench (or the special body), in the incident of unconstitutionality, will only be on the prejudicial question of constitutionality or unconstitutionality of the normative act and not on the facts of the concrete case. The decision issued by the full bench (or the special body) will be applied, then, bindingly, in the decision of the concrete case by the panel.³⁸⁹ It is important to note that, if the majority of voters conclude on the unconstitutionality of the statute or normative act, but the constitutional quorum of absolute majority (Federal Constitution, article 97) is not achieved, the decision of the full bench or the special organ must be by the rejection of the claim of

³⁸⁸ Two other important actions should be cited concerning the concentrated judicial review of legislation in Brazil: the “direct action against unconstitutional omissions” (see Brazilian Constitution, article 103, § 2º) and the “claim against disrespect of a fundamental precept” (article 102, § 1º). They are regulated by Law 12063/2009 (that alters Law 9868/1999) and Law 9882/1999, respectively.

³⁸⁹ See Nery Júnior (2010, pp. 798-799).

unconstitutionality. The case will return to panel, which will have to enforce the statute or normative act, as if it were constitutional.³⁹⁰

Furthermore, despite not having the *erga omnes* efficacy of the decisions in the centralised judicial review of legislation, the decisions on the constitutional question by the full bench or the special body in the incident, surpassing the specific case that allowed it, internally bind the panels of the court, the full bench and the special body in further cases. In further cases, which discuss the same constitutional question, these bodies must apply the understanding issued by the full bench or the special body in the incident. There is nothing more natural, since the court is one single organ, though divided, for functional purposes, in many smaller bodies. These bodies (and the judges, individually) must therefore follow the understanding of the court (represented in the incident by its full bench or the special body).³⁹¹

Throughout the country, the internal regulations of Brazilian courts have been predicting this bindingness that surpasses the specific case. The Internal Regulation of the Federal Supreme Court, for example, in its article 101, states that the declaration of constitutionality or unconstitutionality of a law or legislative act pronounced by a qualified majority, applies to new cases submitted to the panels or the Full Bench, except as stated in art. 103. The principle contained in these internal regulations receives legal support from the Code of Civil Procedure. The single paragraph of article 481 of the Code states that the panels of the courts shall not resubmit the question of unconstitutionality when there has already been a previous pronouncement on the question by full bench or special body of the court or by the Federal Supreme Court. That is to say that, in accordance with the internal regulations and the Code, the previous pronouncement must be applied.³⁹²

4.7.3 The Issue of the General Repercussion (“*Repercussão Geral*”) in Extraordinary Appeals

As briefly seen in Chapters 2 and 3, the Federal Supreme Court, in the Brazilian decentralised judicial review of legislation, commonly performs its appellate

³⁹⁰ See Souza (2006, p. 251).

³⁹¹ *Ibid.*, p. 250.

³⁹² See Amaral Júnior, José Levi Mello do. *Incidente de arguição de inconstitucionalidade* (São Paulo, RT, 2002), p. 80.

jurisdiction via an instrument called extraordinary appeal (“*recurso extraordinário*”).³⁹³ By the extraordinary appeal, a concrete case dealing with constitutional matter, which started before an inferior court, after a long journey and other appeals, finally arrives in the Supreme Court. This appeal to the Supreme Court consists of a procedural-constitutional instrument specifically created to avoid any eventual harm to the Constitution by final decisions from the Brazilian ordinary courts. Its scope is restricted to the (constitutional) questions of law that were supposedly wrongly resolved by the appealed decision. It is not suitable for (re)considerations of facts and evidence.

The extraordinary appeal is the most frequent and one of the most important procedural instruments under the jurisdiction of the Federal Supreme Court. Basically, as Bustamante and Bustamante state, “the issue of the unconstitutionality of any statute, international treaty, legislative decree or administrative resolution which establishes a general norm can be brought before the Supreme Court via a *recurso extraordinário*, although there are some procedural barriers aimed at filtering the number of appeals to the Federal Supreme Court”.³⁹⁴

After the Constitutional Amendment 45/2004 one of these procedural barriers is the requirement of general repercussion (“*repercussão geral*”). According to article 102, § 3º, of the Brazilian Constitution (with the text given by the mentioned amendment), only cases of general repercussion can be submitted to the Supreme Court via extraordinary appeal. Clearly, this requirement of general repercussion was created as an attempt to solve the overwhelming number of appeals to the Federal Supreme Court. The new constitutional provision states that “in an extraordinary appeal, the appealing party must demonstrate the general repercussion of the constitutional issues discussed in the case, under the terms of the law, so that the Court may examine the possibility of accepting the appeal, and it may only reject it through the opinion of two thirds of its members”.³⁹⁵

³⁹³ Historically, this exceptional instrument has great similarities with the old North American model of the writ of error.

³⁹⁴ See Bustamante, Thomas and Bustamante, Evanilda de Godoi. Constitutional Courts as “Negative Legislators”: the Brazilian Case (2010) *Revista Jurídica Piélagus*, p. 140.

³⁹⁵ Translation found in Brazilian Chambers of Deputies. *Constitution of the Federative Republic of Brazil: constitutional text of October 5, 1988, with the alterations introduced by Constitutional Amendments nº 1/1992 through 64/2010 and by Revision Constitutional Amendments nº 1/1994 through 6/1994* (3rd ed, Brasília, Chamber of Deputies - Documentation and Information Center, 2010).

Additionally, this constitutional provision has been recently regulated by Law 11418/2006. It added to the Civil Procedural Code articles 543-A and 543-B. According to article 543-A, by unappealable decision, the Federal Supreme Court will not admit the extraordinary appeals that do not deal with issues of general repercussion. This is a significant change in the extraordinary appeals to the Supreme Court, whose admission shall pass by the examination of the Court regarding this very strict requirement.

For the purposes of general repercussion, it is imperative to recognise issues in the extraordinary appeal which, from the economic, political, social or legal points of view³⁹⁶, trespass the subjective interests of the case (Civil Procedural Code, article 543-A, § 3º). There will also be general repercussion whenever the appeal challenges a decision contrary to the *Súmula* or the dominant case law of the Federal Supreme Court (article 543-A, § 3º).³⁹⁷ Taking into account any of these points of view, if the general repercussion is recognised, the extraordinary appeal should have its merits judged by the Supreme Court. Failing that, the Supreme Court should not give it any follow-up. With this filtering mechanism, the Supreme Court will appreciate only issues of general transcendence (not of individual importance). Roughly speaking, the constitutional issues discussed in the extraordinary appeal should cover or interest (from an economic, social, political or legal perspective) a large number of people beyond the parties involved. The adoption of the procedural-constitutional barrier of the general repercussion clearly highlights the (new) objective character of the extraordinary appeal to the Supreme Court.^{398,399,400}

³⁹⁶ In general, the appellant, under the economic perspective, shall demonstrate the impact of the constitutional issues addressed in the extraordinary appeal on the national economy and tax policies, on essential public services (public transportation, telephone, energy etc.) or on the development of national industry activity or other specific economic sector. Under the social perspective, the appellant must demonstrate, for example, the link of the issue discussed in the appeal with the collective rights protected by the Constitution (education, housing, public health, social security, that is, issues that are often conveyed through collective actions). Politically, the general repercussion can be related to foreign states or international organizations involved in the case, to the fact that the appeal deals with internal conflicts between political or public bodies or because the appeal involves a public policy or an important government program. Finally, under legal point of view, the general repercussion can be based on the fact that the appealed matter involves the definition or a decisive interpretation of a specific legal category or a principle of law.

³⁹⁷ The Internal Regulation of the Federal Supreme Court establishes two cases of presumed general repercussion, which, once it is configured, dismisses the examination procedure of the repercussion. General repercussion shall be presumed either when the matter has already been recognised previously or when the extraordinary appeal challenges decision contrary to the *Súmula* or the predominant case law of the Court (article 323, § 1º).

³⁹⁸ See Souza (2012, pp. 168-170).

According to the Civil Procedural Code, article 543-B, § 1^o, in order to avoid a great number of extraordinary appeals in the Federal Supreme Court, the inferior court are authorised to select one or more representative appeals and forward only them to the Supreme Court, halting the others. However, to decide whether or not an issue is of general repercussion, a decision of the Full Bench of the Supreme Court is required (with the exception given by § 4^o of article 543-A of the Civil Procedural Code). But most important for us, under the system of this procedural-constitutional barrier, the decision of the Supreme Court, which does not recognise the general repercussion in a given situation, will be binding for the Court itself and all the inferior courts, when assessing the admissibility of extraordinary appeals in similar cases. In this case, the decision will bind all extraordinary appeals regarding the same issue, both those that are in the Supreme Court and those that were halted by the inferior courts, which will be promptly dismissed.⁴⁰¹

The decisions concerning the existence or not of general repercussion in extraordinary appeals are unappealable.⁴⁰² And, once the decision concerning the general repercussion is proffered, the Chief Justice's Office shall promote specific and broad publicizing of the content of the decision and shall update the database regarding the issue.⁴⁰³ Efficiently, for the guidance of inferior courts and all lawyers in general, the site of the Supreme Court already provides an extensive list of issues for which the general repercussion has already been recognised as well as a list of issues in which it has not happened. According to the Federal Supreme Court – Report 2011, until that year 509 issues of general repercussion had been accessed by the Supreme Court. From them, 251 had been decided definitively, either because Supreme Court had not recognised the general repercussion in the given situation or because the Court had recognised and also decided the merits of the

³⁹⁹ Based on this idea, § 6^o of article 543-A of the Civil Procedural Code allows the Court (by a decision of the *Rapporteur*), in the analysis of the existence of general repercussion, to admit the intervention of third parties ("*amicus curiae*").

⁴⁰⁰ See Marinoni (2010b, pp. 471-472).

⁴⁰¹ On the other hand, if recognised the presence of general repercussion and decided the merits of the appeal by the Federal Supreme Court, the halted appeals shall be re-analysed by the inferior courts, which can withdraw their previous decisions or decree the appeals aggrieved (Civil Procedural Code, articles 543-B, § 2^o and § 3^o).

⁴⁰² See the Internal Statute of Federal Supreme Court, article 326.

⁴⁰³ See the Internal Statute of Federal Supreme Court, article 329.

extraordinary appeal(s). On the other hand, in 258 cases the general repercussion had been recognised but they were waiting for the decision on the merits.⁴⁰⁴

It is also interesting to mention that, based on the provisions of Law 11419/2006 and the Internal Statute of the Federal Supreme Court, the entire procedure and judgment of the general repercussion issues in extraordinary appeals is currently managed electronically. Indeed, Law 11419/2006 disciplines the use of electronic media in the transmission of records, documents and communication of procedural acts, configuring a very important innovation in the Brazilian judicial process. According to article 8º of this law, “the bodies of the Judicial Power are allowed to create and develop electronic systems for processing judicial actions by means of partially or totally electronic records, using preferably the internet, local or wide area networks”. Therefore, according to the Supreme Court’s Internal Statute, the *rapporteur* of the extraordinary appeal shall electronically submit, to the other Justices of the Court, his/her opinion on the existence or not of general repercussion in the case. Once the manifestation of the *rapporteur* is received, the associate Justices shall also electronically submit to the *rapporteur* their manifestations on the general repercussion. This system is called the “Virtual Plenary” (or “Virtual Full Bench”) and has been working with great success since 2008.

The idea behind the requirement of general repercussion, evidently, is that only the really relevant questions will be finally decided by the Federal Supreme Court and not what is simple nonconformity of the losing parties (as important as their issues are for them), in order to improve, by decreasing the demand upon it, the Court’s quality of adjudication. The requirement of general repercussion tends to drastically reduce the number of extraordinary appeals in the Court and to limit the object of those admitted to properly constitutional matters. It has created promising prospects to the decentralised judicial review of legislation in Brazil, especially regarding to the role of the Supreme Court as the Brazilian Constitutional Court.

Indeed, as will be mentioned in Chapter 5 and fully commented in Chapter 6, the adoption of new constitutional-procedural mechanisms, such as the requirement of general repercussion in extraordinary appeals and the Binding *Súmula*, has already lead to a visible reduction in the number of cases, dealing with identical or

⁴⁰⁴ See Supremo Tribunal Federal. *Relatório de atividades 2011/Supremo Tribunal Federal* (Brasília, Supremo Tribunal Federal, 2011), p. 49.

similar law thesis, before Federal Supreme Court.⁴⁰⁵ Comparing the period of crisis in the 1990s and at the beginning of this century, when the number of cases before the Supreme Court reached insupportable figures, the situation has clearly improved. To give some figures from recent years, in 2006 127,535 cases arrived at the Supreme Court. In 2007, there were 119,304, in 2008 – 100,895, in 2009 – 82,221, in 2010 – 74,708, and in 2011 – 63,427.⁴⁰⁶ As a consequence, the number of cases in trial before de Federal Supreme Court has also been decreasing. In 2006, they were 150,001, in 2007 – 129,623, in 2008 – 112,080, in 2009 – 100,634, in 2010 – 90,295, and in 2011 – 67.395.⁴⁰⁷ Consequently, there is an unquestionable pragmatic value supporting the requirement of general repercussion in extraordinary appeals, which has decisively contributed to the reduction in the backlog of trials before the Federal Supreme Court.

4.7.4 Binding Decisions on the Centralised (“*Concentrado*”) Judicial Review of Legislation

(i) The Relevance of the Bindingness

In Brazil, as already seen, the coexistence of the two models of judicial review of legislation, centralised and decentralised, gives rise to a system that calls for special attention concerning the consistency of the constitutional case law. Brazil, inspired by the American example, has adopted the decentralised model of control but without incorporating the American tradition of binding precedents. While in the United States the decisions on decentralised control are fairly uniform by the application of a theory binding precedents^{408,409}, in Brazil, exactly by the absence of

⁴⁰⁵ Linking the requirement of general repercussion in extraordinary appeals and the Binding *Súmula*, see Oliveira, Pedro Miranda de. O binômio repercussão geral e súmula vinculante. In Wambier, Teresa Arruda Alvim (coord). *Direito jurisprudencial* (São Paulo, RT, 2012), pp. 675-750.

⁴⁰⁶ See Supremo Tribunal Federal (2011, p. 40).

⁴⁰⁷ See Supremo Tribunal Federal (2011, pp. 38-39).

⁴⁰⁸ With regard to the bindingness of constitutional decisions in Europe (specifically in France) and the United States, see Luchaire, François. *Le juge constitutionnel en France et aux États-Unis* (Paris, Economica, 2002), pp. 12-16.

⁴⁰⁹ Traditionally, the control of constitutionality exercised in France by the *Conseil Constitutionnel* is not considered judicial, but rather political. It has been said that the French control is a measure (precisely a preventive binding opinion) that is introduced to the actual process of formation of the law - and from this process therefore adopts the same nature. Nevertheless, the status of the judicial

this doctrine, this standardisation historically does not exist. Commonly, the very same law or normative act, previously to be subject to centralised control of the Federal Supreme Court, is subject to decentralised review, incidentally in concrete cases, in several inferior courts the country. This generates, repeatedly, conflicting decisions, with the same normative act been considered as constitutional by some judges and courts and unconstitutional by others. Under the idea of isonomy, this is not desirable. The problem could become much more serious if this contradiction is concerning the decisions on centralised control of the Federal Supreme Court, the organ expressly responsible for safeguarding the Constitution.^{410,411} Having the mechanisms to harmonise the two models, enforcing the centralised one, is of great importance to reduce the problem of absence of standardisation to an acceptable degree.⁴¹²

Currently, in Brazil, it is unanimously recognised that, if the power to have the last word regarding the conformity of the laws with the Constitution is a prerogative of the Federal Supreme Court (the Brazilian Constitutional Court),⁴¹³ there is nothing more natural and necessary than the universal bindingness concerning the decisions of this Court, following the example of the European Constitutional Courts, in the case of the centralised judicial review of legislation.⁴¹⁴ Despite the Brazilian

review in France has recently been perceived from a slightly different perspective. According to Drago, among others, in virtue of the status of its members, its powers, the procedures adopted today and its own case law, the French Constitutional Council has increasingly approached (and perhaps has already reached) the Kelsenian or European model of Constitutional Justice. See Drago, Guillaume. *Contentieux constitutionnel français* (2nd ed, refondue, Paris, PUF, 2006), pp. 50-54.

⁴¹⁰ With regard to the Constitutional Court as the Guardian of the Constitution, see Dokhan, David. *Les limites du contrôle de la constitutionnalité des actes législatifs* (Paris, LGDJ, 2001), pp. 26-30.

⁴¹¹ About the concept of Guardian of the Constitution, which “a été développé par certains juristes allemands pendant la République de Weimar”, see Gusy, Christoph. Juge constitutionnel et «gardien de la Constitution». In Grewe, Constance et al. *La notion de «justice constitutionnelle»* (Paris, Dalloz, 2005), pp. 161-172.

⁴¹² After all, in Brazil as in England, as Allan states, a fundamental, though formal, equality is secured by the generality of the law: all should be treated equally in accordance with whatever scheme of justice is enacted by the Legislature or enforced by the courts. See Allan, T.R.S. *Constitutional Justice: a Liberal Theory of the Rule of Law* (Oxford, Oxford University Press, 2003), p. 32.

⁴¹³ The denomination does not matter. As Canas (1994, p. 21) mentions, whether specific bodies of review of constitutionality or whether executing other tasks in parallel, they are called Constitutional Court, Constitutional Council, Constitutional Guarantees Court, Supreme Constitutional Court, High Court or otherwise, and today are found in all continents.

⁴¹⁴ Kelsen highlighted this fact, defending that a court, especially a constitutional court or a court of last resort, should be empowered to create, by its own decision, not only individual norms binding on the case *sub examine*, but general norms. About the Kelsenian Constitutional Court, see Sweet (2000, pp. 34-38 and 133-139).

connection to the civil law tradition, these decisions must be formally binding (and, by constitutional directive, are) and be followed by the lower courts and the Administration as a whole. A diverse situation would imply, in essence, the non-compliance of the very authority of the Constitution.

According to the text of the Brazilian Constitution (with Amendment 45/2004) and articles 23 (*caput*) and 24 of Law 9868/1999⁴¹⁵, in both the direct action of unconstitutionality or the declaratory action of constitutionality, once the absolute majority (6 of 11 Justices) reaches a decision, the constitutionality or unconstitutionality of the normative act in question must be declared. A direct action of unconstitutionality must result in a declaration of unconstitutionality if it is considered well-founded; and, if considered unfounded, a declaration of constitutionality. A declaratory action of constitutionality must also result in a declaration of unconstitutionality when it is considered baseless; and in a declaration of constitutionality if it is considered well-founded.^{416,417} Expressly, the Constitution provides that both actions, declaring the law constitutional or unconstitutional, shall produce efficacy against everybody and binding effect. Law 9868/1999, in the single paragraph of its article 28, also states that any declaration of constitutionality or of unconstitutionality, including the interpretation according to the Constitution and partial declaration of unconstitutionality without reduction of text, has an efficacy against everyone and binding effects in relation to judicial courts and to the Administration as a whole at federal, state and municipal levels.⁴¹⁸ Courts and the Administration are to apply, to the cases and issues under their responsibility, the understanding adopted by the Federal Supreme Court in respect to the constitutionality or unconstitutionality of the normative act. If this is not done, they will be disobeying a decision of the Supreme Court, which “opens the doors” to a

⁴¹⁵ It regulates the proceeding of the direct action of unconstitutionality and the declaratory action of constitutionality.

⁴¹⁶ In substance, there is no difference between the direct action of unconstitutionality and declaratory action of constitutionality. They actually have the same object, just asking the same “question” in a different way and it is supposed that Brazil is alone in the world with the creation of the declaratory action of constitutionality.

⁴¹⁷ See the opinion of Justice Sepúlveda Pertence in *Ação Declaratória de Constitucionalidade* – ADC-MC 4/DF – STF – Full Bench – *Rapporteur* Justice Sydney Sanches – j. 11-2-1998 – DJ 21-5-1999 – EMENT 1951-1 – RTJ 169 pp. 383-437.

⁴¹⁸ See Vigliar, José Marcelo Menezes. *Reforma do Judiciário e as súmulas de efeitos vinculantes*. In Tavares, André Ramos; Lenza, Pedro and Alarcón, Pietro de Jesús Lora. *Reforma do Judiciário* (São Paulo, Método, 2005), p. 287.

Reclamação (as stated in article 102, I, “I” of the Federal Constitution) and, naturally, to appeals applicable to higher courts. Apart from the new Supreme Court’s Binding *Súmula* (see Chapter 5), this is the only undisputable case of universal bindingness of precedents in Brazil.

Before discussing the details of the treatment given to the theme in Brazil, it is important to make it clear that despite the similarities, the decision of binding effects to the judicial review of legislation in Brazil and the doctrine of *stare decisis* in Anglo-American law are different categories. The difference, among other things, is in the fact that in the doctrine of *stare decisis*, the precedent to be followed – or, more precisely, the *ratio decidendi* to be followed – stems from a concrete case. In deciding whether to follow or not to follow the precedent, the judge of the case on trial makes a comparison of the facts in an appropriate degree of generality; if he finds equivalency, he should follow the precedent applying it to the case on trial. In contrast, in Brazil, the model of centralised judicial review of legislation, although establishing a binding decision, does not deal with facts. Purely a question of law, the review of the Supreme Court is in abstract and only recognises the constitutionality or unconstitutionality of the normative act. It is of the responsibility of a later court which is supposedly entitled to apply the binding decision of the Supreme Court to examine the suitability of the facts of the case on trial with this decision, but without comparing them with the facts of this precedent, as they do not exist.

(ii) Distinctions between Res judicata, Erga Omnes Efficacy and Binding Effect in Brazil

For the purpose of Brazilian law, it is important to distinguish the concepts of *res judicata* and *erga omnes* efficacy and the binding character of a precedent. Firstly, mainly in concrete cases, the function of the *res judicata* is to allow the prevailing party to enjoy the judicial decision that was granted without fear that it can be challenged in the future. The *res judicata* aims to provide security to the parties and, therefore, is related only to the operative part of the final decision. The *erga omnes* efficacy (especially in class actions and centralised judicial review of legislation) is connected with the direct effects of the decision, which should cover

everyone. It is not the *res judicata*, which does not extend beyond the parties involved, that operates *erga omnes*, but the direct effects of the decision.

Erga omnes efficacy and binding effect are also distinct categories. This became clear with Constitutional Amendment 3/1993 and the text given to § 2º of article 102 of the Federal Constitution, which creates the declaratory action of constitutionality and expressly states *erga omnes* efficacy and binding effect as different things.

Erga omnes efficacy in a decision in centralised review in Brazil means that the decision affects the general and abstract validity of the normative act reviewed and, therefore, affects everyone.^{419,420,421} In Brazil, declaring the constitutionality or unconstitutionality of a law or normative act – in the first case *confirming* the general and abstract efficacy to which it is innate, in the second case by *removing* its efficacy – the Federal Supreme Court decision actually affects all potential recipients, including the public Administration, the other bodies of the Judicial Power and the actual Supreme Court.

Binding effect (or bindingness) means something different. Following the European example (although, in Europe, the contours of the binding effect vary by national system), in Brazil the binding effect is considered as a quality of the decision that goes beyond its *res judicata* and *erga omnes* efficacy. In short, it is a plus in relation to *erga omnes* efficacy, signifying that the decision must be followed by other bodies of the Judicial Power and the public Administration as a whole.

The bindingness of a precedent is related to determining grounds of the decision (*ratio decidendi*). This bindingness is intended to provide legal certainty, consistency, predictability and equality to judicial decisions, and not ensure the immutability of the solution given to a certain case (the function of the *res judicata*). One can also say that the *res judicata* is related to the operative part of the decision of the individual case, while the binding character is related to the fundamentals

⁴¹⁹ A long time ago, Calamandrei, considering Italian law and only referring to the declaration of unconstitutionality, stated that, based on the extent of its effects, it can be distinguished according to it leads to invalidate the general and abstract validity of the normative act or it leads to only deny its application to the concrete case. See Calamandrei, Piero. *Direito processual civil*, vol 3 (Luiz Abezia and Sandra Drina Fernandez Barbery trs, Campinas, Bookseller, 1999), v. 3. p. 32.

⁴²⁰ It corresponds, although not completely, to the so-called “force of law” of the German judicial review model.

⁴²¹ See Martins, Ives Gandra da Silva and Mendes, Gilmar Ferreira. *Controle concentrado de constitucionalidade: comentários à Lei n. 9.868, de 10-11-1999* (São Paulo, Saraiva, 2001), p. 326.

(*ratio decidendi*) of the decision, preventing them from being ignored in other decisions of the same or lower courts. In the case of the concentrate judicial review of legislation, it is inconceivable that a particular legal provision is constitutional for some situations and unconstitutional in others. This indispensability of the question of constitutionality to be decided uniformly in all jurisdictions, with the support of the Federal Constitution (article 102, §2º) and Law 9868/1999 (article 28, sole paragraph), leads to the bindingness of the *rationes decidendi* (determining fundamentals) of Federal Supreme Court's decisions in direct actions, which bind all the other organs of the Judiciary and the Public Administration at the federal, state and municipal levels.

Besides, the binding effect imposes a procedural qualified force to the decision, in the event of recalcitrance of the other courts or the Administration, to impose the compliance of the decision:⁴²² the “*Reclamação Constitucional*” (“Constitutional Complaint” or “Constitutional Claim”),⁴²³ a kind of injunction.⁴²⁴ In practical terms, this means that the public Administration and courts, in proceedings in which the same question should be incidentally decided, must apply what was decided by the Federal Supreme Court in the centralised control. In case of non-compliance, it can be filed a *Reclamação* (directly to the Supreme Court), as states article 102, I, *l*, of the Federal Constitution⁴²⁵, as well the appeals to higher courts. That is to say, if the decision in centralised control is not followed, a legally entitled person may use a specific injunction, the *Reclamação*, applying to the Federal Supreme Court that must directly ensure the authority of its decision.

⁴²² See Zavascki, Teori Albino. *Eficácia das sentenças na jurisdição constitucional* (São Paulo, RT, 2001), p. 37.

⁴²³ Historically, the *Reclamação* is the result of a praetorian construction of the Federal Supreme Court from the middle of this century, based mainly on the theory of implicit powers, from American law, and was subsequently introduced into the Internal Regulations of this court. Passing through other stages, it ended up to be introduced in the current Constitution, both for the Federal Supreme Court and the Superior Court of Justice, to preserve their jurisdiction and the authority of their decisions. See Dantas, Marcelo Navarro Ribeiro. *Reclamação Constitucional no Direito Brasileiro* (Porto Alegre, Sergio Antonio Fabris, 2000), pp. 519-520.

⁴²⁴ Concerning binding effect and *Reclamação*, see Schäfer (2012, pp. 150-158).

⁴²⁵ See passage of the opinion of Justice Celso de Mello in *Ação Declaratória de Constitucionalidade* – ADC-MC 4/DF – STF – Full Bench – *Rapporteur* Justice Sydney Sanches – j. 11-2-1998 – DJ 21-5-1999 – EMENT 1951-1 – RTJ 169 p. 436: “One cannot ignore at this point that one of the procedural goals of the *Reclamação* precisely consists of ensuring the authority of decisions issued by the Federal Supreme Court, as has been emphasized by the case law of this court (*Reclamação* 644/PI, *Rapporteur* Justice Carlos Velloso)”.

(iii) Objective Limits of the Binding Effect

One point that has raised great debate in Brazil concerns the objective limits of the binding effect. What would be achieved by this effect? Does it only comprise the provision of the decision or, like the German⁴²⁶ and Portuguese⁴²⁷ models, also (or mainly) comprise the determining fundamentals of the decision?

In Brazil, there is some dispute in doctrine. Some argue that the bindingness, currently disciplined in article 102, § 2º, of the Brazilian Constitution, applies only to the provision of the decision.⁴²⁸ However, other authors defend, following what happens in German Constitutional Court, the extension of the binding effect not only to the provision of the decision, but also (or mainly) to its fundamentals.^{429,430,431}

⁴²⁶ In Germany, to be precise, some defend, like Wischermann, a restrictive interpretation of paragraph 31, I, of the Organic Law of the Constitutional Court and that the binding effect has to be subjugated, similar to what happens with *res judicata* and *erga omnes*, to the operative part of the decision. However, the German Constitutional Court has the understanding - and thus has become the dominant view - that the binding effect also covers the determining fundamentals of the decision, that must be followed by all the courts in the trial of future cases. Consequently, the binding effect transcends the case of the norm in particular, the object of review in the decision, since the idea that is behind the operative part of the decision, that is to say, the fundamentals, is also binding for the review of constitutionality of similar norms, when this idea or fundamentals are also applicable. See Martins and Mendes (2001, p. 340).

⁴²⁷ Portugal follows the same direction outlined by the German Constitutional Court. Sometimes, when the Portuguese Constitutional Court declares the unconstitutionality of a normative act, the characteristics of the function pursued by that organ shall require that the binding effect occurs not only in relation to the provision of the decision (which states a norm as unconstitutional and where the effects are fixed), but also in relation to the reasons that determine this provision: the interpretation of the law that was used by the TC, the interpretation of the Constitution, the practical consequences of the application of each one, the way in which the relationships are established between the two. In this way, the recipients of the decision of unconstitutionality must consider not only the provision of the decision, but also the fundamentals, having to refrain from making new identical norms to those declared unconstitutional, and perhaps even produce other norms which, although not identical, have identical results, are the fruit of matching assumptions, or do not take into account the interpretation of the Constitution that the Constitutional Court established in its decision. See Canas (1994, p. 176).

⁴²⁸ See Palu, Oswaldo Luiz. *Controle de constitucionalidade: conceito, sistemas e efeitos* (São Paulo, RT, 1999), p. 229.

⁴²⁹ See Nobre Júnior (2000a, p. 154).

⁴³⁰ The conception of the binding effect established by Brazilian Constitution is strictly linked to the Germanic model disciplined in Paragraph 31, 2, of the Organic Law of the its Constitutional Court. The very justification of the proposal presented by Congressman Roberto Campos, for discussion and approval of Amendment 3/93 to the Brazilian Constitution, leaves no doubt of the intention to grant not only *erga omnes* efficacy, but also the binding effect to this type of decision, leaving it also clear that these would not only be confined to the provision part. Although Amendment 3/1993 has not incorporated the proposal in its entirety, it is certain that the binding effect, in the part that was incorporated in Brazilian constitutional law, must be studied in light of the elements contained in this original proposal.

⁴³¹ See Marinoni (2010b, pp. 258-259 and 272).

There is no definitive position of the Brazilian Federal Supreme Court on the question. However, there are some decisions showing a tendency. An example is *Reclamação* 2126/SP⁴³², where the procedural implications of the binding effect arising from a final decision in direct action of unconstitutionality were specifically addressed. Justice Gilmar Mendes, in appreciating and granting a preventive measure, consigned that in the case, although the impugned acts do not maintain absolute identity with the central theme of the decision of the Supreme Court in Direct Action of Unconstitutionality 1662/SP⁴³³ (that would be being disobeyed), it was worth noting that the extent of the binding effect of that decision cannot be limited to its provision, having also to consider the so-called “determining fundamentals”.

The same understanding, which recognises the binding character to the determining fundamentals of the Supreme Court’s decisions in centralised judicial review of legislation, was recognised by the Full Bench of the Court in *Reclamação* 2363/PA⁴³⁴. In this case, the same Justice Gilmar Mendes, as the *rapporteur*, noted that the Supreme Court has frequently applied the fundamentals of a leading case in similar cases dealing with the judicial review of municipal laws. He emphasised he had found in survey that many Justices of the Court have consistently applied, in cases discussing the constitutionality of a municipal law, the fundamentals of a precedent set in similar situations to laws from other municipalities.

Another very good example is the Federal Supreme Court’s decision in *Reclamação* 1987/DF.⁴³⁵ In this case, the Full Bench of the Supreme Court expressly acknowledged the possibility of recognising (in the Brazilian legal system) the existence of the phenomenon of “transcendence of the fundamentals” of the decisions in the centralised judicial review of legislation and proclaimed that the binding effect of its decisions refers to the *ratio decidendi* (the fundamentals given by the Supreme Court to declare the unconstitutionality of a normative act) in addition to

⁴³² *Reclamação* – Rcl-MC 2126/SP – STF – *Rapporteur* Justice Gilmar Mendes – j. 12-8-2002 – DJ 19-8-2002.

⁴³³ *Ação Direta de Inconstitucionalidade* – ADI 1662/SP – STF – Full Bench – *Rapporteur* Justice Maurício Corrêa – j. 30-8-2001 – DJ 19-9-2003 PP-00014 – EMENT VOL-02124-02 PP-00300.

⁴³⁴ *Reclamação* – Rcl 2363/PA – STF – Full Bench – *Rapporteur* Justice Gilmar Mendes – j. 23-10-2003 – DJ 1-4-2005 PP-00007 – EMENT VOL-02185-01 PP-00139 – RTJ VOL-00193-02 PP-00513.

⁴³⁵ *Reclamação* – Rcl 1987/DF – STF – Full Bench – *Rapporteur* Justice Maurício Corrêa – j. 1-10-2003 – DJ 21-5-2004 PP-00033 – EMENT VOL-02152-01 PP-00052.

the operative part of the constitutional decision. The Supreme Court concluded that in the case in trial (*Reclamação* 1987/DF) it should apply the *ratio decidendi* (determining fundamentals) of Direct Action of Unconstitutionality 1662/SP.

Supporting the extensive point of view, Law 9868/1999, which regulated the proceeding of the direct actions of unconstitutionality and constitutionality, states that the declaration of constitutionality or unconstitutionality, including the interpretation according to the Constitution and the partial declaration of unconstitutionality without reduction of text, has *erga omnes* efficacy against everybody and binding effects in relation to the Judicial Power and the federal, state and municipal public Administration (article 28, sole paragraph). By attributing bindingness to the interpretation according to the Constitution and the partial declaration of unconstitutionality without reduction of text, Law 9868/1999 suggests that, in Brazilian law, this bindingness must be extended beyond the provision of the decision, also covering the fundamentals of the decision. It is understood as such because, with this legal provision (considered constitutional by the Federal Supreme Court),⁴³⁶ the system has shown to be more concerned about the content of the decision in centralised control of constitutionality than its form.⁴³⁷ These interpretative decisions, which respond to a need of the system and establish a special interpretation different to that of the literal meaning of the legal text, create an almost new norm of greater or lesser extent of the literal meaning established by Parliament. Frequently, the interpretation or the “new norm” is not found in the provision of the decision, but it refers to the fundamentals, with the resulting complexity for its determination and difficulty for the knowledge of the judges, administrators and lawyers.⁴³⁸

The fact is that the restrictive view (bindingness only to the provision of the decision) is very concerned with the *res judicata* concept and its objective limits. Sometimes, it even confuses *res judicata* with binding effect, believing that the objective limits of this must coincide with those of the latter. Evidently, in Brazil, what is covered by *res judicata* is only that which is described in the provision of a

⁴³⁶ *Reclamação* – Rcl-AgR-QO 1880/SP – STF – Full Bench – Rapporteur Justice Maurício Corrêa – j. 7-11-2002 – DJ 19-3-2004 PP-00017 – EMENT VOL-02144-02 PP-00284.

⁴³⁷ See Souza (2006, p. 222).

⁴³⁸ See Aja, Eliseo and Beilfuss, Markus Gonzáles. *Conclusiones Generales*. In AJA, Eliseo (ed). *Las tensiones entre el Tribunal Constitucional y el Legislador en la Europa actual* (Barcelona, Ariel, 1998), p. 277.

decision on the merits. However, it is binding effect that we are dealing with. In this case, it is necessary to consider the special structure of the centralised judicial review of legislation in Brazil. In the strict sense, there are no parts and there are no facts. Only those who may file the actions require, directly to the Federal Supreme Court, the affirmation of the constitutionality or unconstitutionality of a normative act (or how this could be interpreted as constitutional), and everything in abstract. Certainly, in regards to a similar or identical normative act, the decision of the Federal Supreme Court would be the same, because the fundamentals are identical. It is logical to anticipate this inevitable decision. This will result in saving of time and resource and, above all, ensure standardisation in the treatment of identical situations, the goal in this type of review.⁴³⁹ For instance, if a certain state normative act is declared unconstitutional, there is no reason to continue applying – as if it were constitutional – an identical law of another state of the Federation. The basis for the decision of direct action applies to both and must therefore have a binding effect.^{440,441}

Following the extensive tendency, in a certain sense Brazil is progressing toward the doctrine of *stare decisis* as it is applied in common law tradition. In that tradition, there is the binding application of the precedent to “similar” concrete cases. In the case of Brazilian centralised judicial review of legislation, as it deals with abstract norms, it is the application of the precedent to “similar” normative acts. Even so, Brazil is not acting revolutionarily if it is compared to what takes place in the tradition of common law. The similarity between two legislative acts will often mean true identity, contrary to what occurs in the doctrine of *stare decisis*, in which, by dealing with concrete cases – and the concrete cases always have their peculiarities – the similarity will hardly imply identity.⁴⁴²

(iv) Subjective Limits of the Binding Effect

⁴³⁹ See Marinoni (2010b, pp. 467-468).

⁴⁴⁰ See Souza (2006, p. 223).

⁴⁴¹ See also Marinoni (2010b, p. 278).

⁴⁴² Evidently, sometimes, as Marinoni explains (2010b, pp. 369-377), it is possible (and adequate) to distinguish the concrete case in trial from Federal Supreme Court’s supposed binding decision in the concentrated judicial review of legislation.

Another point that deserves to be addressed is the subjective limits of the binding effect. In Brazil, it is understood that the decisions of the Federal Supreme Court in direct actions of unconstitutionality and declaratory actions of constitutionality bind the other judicial courts as well as the Administration as a whole. It is a consequence of the literal meaning of the constitutional text.

However, in Brazil there is some debate around two connected points: (i) do the decisions in direct actions, following European examples, also bind the Legislature that could not issue a norm of equal content (the problem here, evidently, stands in the face of the decisions that declare a norm unconstitutional)?^{443,444,445} (ii) Do the decisions in a direct action bind the Supreme Court itself that could not reconsider the matter further and, if thinks appropriate, decide differently?

Firstly, based on a literal interpretation of the constitutional text, the understanding that the binding effect only covers the judicial courts (with exception of the Supreme Court) and the administrative bodies, not binding the Legislature in its typical functions, which can approve a norm with the same content that it was recognised as unconstitutional by the Supreme Court (certainly, this problem does not arise in the case of declaration of constitutionality), prevails in Brazil.^{446,447,448}

⁴⁴³ Concerning Europe, it can be said that in Germany the general rule is the binding of the Legislature to the decisions in direct actions that declares the unconstitutionality of a normative act, which cannot issue a new norm of the same content. As article 31.1 LTCF establishes, the decisions of the Federal Constitutional Court (TFC) bind the constitutional organs of the Federation and of the States (*Länder*), as well as all courts and administrative bodies. With regard to sentences of “cassation”, that is, those who declare that a norm is invalid or incompatible with the constitution, the binding effect signifies a prohibition of reiteration by the Legislature, which can neither go back to approving a norm which is declared unconstitutional, nor repeat the constitutional error committed. See Weber, Albrecht. Alemania. In Aja, Eliseo (ed). *Las tenciones entre el Tribunal Constitucional y el Legislador en la Europa actual* (Barcelona, Ariel, 1998), p. 73.

⁴⁴⁴ According to Romboli, the Italian Constitution does not contain a written principle requiring the legislative authorities to not re-adopt a law that was already considered illegitimate by the Constitutional Court. This consequence, however, is easily deduced from the principles relating to the system designed by the Constitution and therefore the role it grants to bodies holding legislative power (Parliament - Government) and to the organs designed to perform the review of legislation and maintain the integrity of the system, that is to say, the “guardians of the Constitution” (Constitutional Court and President of the Republic). To a similar conclusion comes the doctrine that has been specifically occupied with this question (Modugno, and especially D'orazio), which has defended, in this regard, a strict prohibition for the legislature to reproduce *illico ac immediate*, a norm declared unconstitutional. See Romboli, Roberto. Italia. In Aja, Eliseo (ed). *Las tenciones entre el Tribunal Constitucional y el Legislador en la Europa actual* (Barcelona, Ariel, 1998), p. 121.

⁴⁴⁵ In Portugal, finally, if the circumstances that led to the declaration of unconstitutionality were not modified, the Legislature cannot re-approve an identical norm that was declared unconstitutional by the Constitutional Court. Obviously, in cases of mere formal unconstitutionality, evidently, a norm of identical content can be re-approved, once it has been remedied of the flaw of unconstitutionality. See Almeida (1998, p. 244) and Canas (1994, pp. 121 and 172-173).

⁴⁴⁶ See Palu (1999, p. 229), Nobre Júnior (2000a, p. 154) and Lourenço, Rodrigo Lopes. *Controle de*

One objection to extend the binding effect of the decision declaring the unconstitutionality of the norm to the Legislature is the reverence (almost religious in some minds) to the doctrine of separation of powers. A second alleged obstacle is the actual absence of any constitutional text expressly addressing the bindingness towards the Legislature. However, in future, it is believed Brazil will be able to surpass both objections. Firstly, the theory of separation of powers, in the current comparative conception and in Brazil's case, is not so strict. If this were so, it would not even permit the judicial review of legislation by the Judicial Branch. But it does allow it, and no one can argue this. Concerning the second obstacle, this also occurs in Italy (as has been seen in footnote) and there the binding of the Legislature is recognised. In fact, in Brazil, as well as in Italy, an explicit affirmation of the extent of the binding effect to the Legislature was – and is – unnecessary. This bindingness is implied in the very constitutional model designed by the Brazilian Constitution of 1988, in which the Federal Supreme Court exercises the role of guardian of the Constitution (see article 102, *caput*, of the 1988 Constitution). It is its responsibility to give the last word on the constitutionality of infra-constitutional legislation. There is nothing more natural than the Legislature being bound to this, not only for the specific norm declared unconstitutional by direct action (and on this no one disagrees), but also for the future, not being entitled to issue a new norm of identical content of that which was considered unconstitutional. The situations that interest – constitutionality or unconstitutionality – are identical to both norms, the new and the old one. If a norm (or a similar norm) has already been declared unconstitutional, what is the reason, if there was no constitutional mutation, for the Legislature to repeat the same mistake?⁴⁴⁹

It is true that to declare that the Legislature is prohibited from issuing a norm of identical content to that declared unconstitutional by the Supreme Court in a direct action is not to say that it factually removes from the Legislature the capacity to go

constitucionalidade à luz da jurisprudência do STF (Rio de Janeiro, Forense, 1999), pp. 137-138.

⁴⁴⁷ See also opinion of Justice Moreira Alves, as the *Rapporteur*, in *Ação Declaratória de Constitucionalidade* – ADC-QO 1/DF – STF – Full Bench – j. 27-10-1993 – DJ 16-6-1995 – LEX/JSTF, n. 214, p. 38.

⁴⁴⁸ This immunity of the Legislature in Brazil just covers the legislative activity properly said or the “materially legislative activity” (using a current expression in Brazil). It does not cover its administrative activities.

⁴⁴⁹ See Souza (2006, p. 227).

voluntarily against the decision of the Supreme Court and actually to issue a new norm of equal content. In fact, it would be completely unrealistic. The very nature of the legislative procedure, which in essence is a political procedure, prevents one to think like this. What is meant here is: once a norm of identical content to that declared unconstitutional in a direct action is issued, by this fact alone (without need of a new declaration of unconstitutionality via direct action), it must be unapplied by courts and the administrative agencies, and if applied, it will enable the use of the *Reclamação*.⁴⁵⁰

The second question – do the decisions in direct actions bind the actual Federal Supreme Court, which cannot reconsider the matter further and, if appropriate, decide to the contrary to its earlier decision? – is capacious, especially because it is a question that should be divided in two. The first question is: do the decisions in direct action bind the Supreme Court? The second is: can the Supreme Court reconsider the question of constitutionality already decided and, if appropriate, decide to the contrary to its earlier decision?

The answer to the first sub-question, according to the prevailing opinion, is that the Federal Supreme Court is not formally bound – in future similar cases – by the determining fundamentals of its own previous decision in direct actions of constitutionality or unconstitutionality. In Brazil, the formula adopted by Brazilian Constitution excludes the Supreme Court from the sphere of the application of binding effect. The explicit reference to the binding effect in relation “to other organs of the Judicial Power” legitimises this understanding.⁴⁵¹ Furthermore, there is the fact that a *Reclamação* would certainly be absurd before the Supreme Court to ensure the authority of its own decisions that would be disobeyed by itself. As has been said, the possibility of *Reclamação* is the main practical consequence of the binding effect in direct actions.

The negative answer to the first sub-question could suggest to us that the answer to the second should be positive. This would be a great mistake. In Brazil, the second question is much more related to the *res judicata* and to the *erga omnes* efficacy than to the binding effect. The decisions on the merits pronounced by the

⁴⁵⁰ *Ibid.*, p. 228.

⁴⁵¹ Referring to this question, German constitutionalism has been the Brazilian source of inspiration and this has been the dominant orientation there. Indeed, although the Organic Law of the German Constitutional Court is not explicit in this regard, the Constitutional Court considered unacceptable to create a self-bindingness. See Martins and Mendes (2001, p. 342).

Federal Supreme Court in centralised review of legislation follow the general rule: materially produce *res judicata*, becoming indisputable and immutable.⁴⁵² So, as a general rule, the *res judicata* and the *erga omnes* efficacy prevent the constitutionality of the same legislative act to be submitted to the Supreme Court once again. Although *res judicata* and *erga omnes* efficacy merely extend to the provision of the decision (unlike what happens with the binding effect), in relation to that specific normative act, which appears in the provision, their occurrence means that a new assessment is sealed.⁴⁵³

Certainly, in Brazil, in regards to a decision that declares the constitutionality of a normative act, there is the possibility of constitutional mutation, which, exceptionally, allows the constitutionality of the same act to be re-submitted to the consideration of the Federal Supreme Court and, if appropriate, receive a different decision.

(v) *The Binding Effect of Preventive Measures*

In Brazilian's centralised review of legislation, the concession of preventive measures is possible when required to prevent the harmful effects of inferior court decisions (or of administrative behaviour) against what perhaps might be decided by the Federal Supreme Court in the final decision of the direct action. With the preventive measure, the Supreme Court aims to ensure the efficacy of its future decision.

With the question put in these terms, the Federal Supreme Court has understood, since Declaratory Action of Constitutionality 4/DF, that the preventive measure granting in a direct action, appreciating the constitutionality of the normative act, will immediately bind the other courts, which are dealing with the constitutionality of the same act.⁴⁵⁴ The inferior courts, to the extent of the preventive measure, will be prohibited to apply, in appreciating the concrete cases, diverse understanding of

⁴⁵² Also in Germany, where there is no self-bindingness to Constitutional Courts, this understanding prevails. As Weber states, similar to final decisions of other judicial bodies, the final decisions of the Federal Constitutional Court (TDF) also have the effect of formal *res judicata*, since such sentences are unappealable. The formal *res judicata* also constitutes the starting point of material *res judicata*. See Werber (1998, p. 71).

⁴⁵³ Souza (2006, p. 229).

⁴⁵⁴ *Ação Declaratória de Constitucionalidade – ADC-MC 4/DF – STF – Full Bench – Rapporteur Justice Sydney Sanches – j. 11-2-1998 – DJ 21-5-1999 – EMENT 1951-1 – RTJ 169 pp. 383-437.*

that adopted by the Supreme Court. If it was the case of considering the normative act as constitutional, the inferior courts cannot stop applying the norm on the grounds of its unconstitutionality. According to Law 9868/1999, article 21, in the declaratory actions of constitutionality, the Supreme Court can also pronounce a preventive measure, suspending the various cases on the same controversial theme throughout the country until its final decision in the direct action.

Assuring the same in direct actions of unconstitutionality, articles 23 (*caput*) and 24 of Law 9868/1999 say that the constitutionality or unconstitutionality of the normative act shall be pronounced if either way they had manifested at least six *Ministros* (Justices), whether to be a direct action of unconstitutionality or declaratory action of constitutionality. Besides, with this appropriate quorum, the constitutionality or unconstitutionality of the normative act shall be declared with *erga omnes* efficacy and binding effect.⁴⁵⁵

4.7.5 The Issue of Prospective Decisions in the Context of the Centralised (“*Concentrado*”) Judicial Review of Legislation

The issue of prospective decisions is of special relevance in the context of the Brazilian centralised judicial review of legislation. It is related to the time effectiveness of the decision that resolves a constitutional question, “declaring” the unconstitutionality of a law or normative act: are the “effects” of this decision to be retroactive or merely prospective?

As seen in Chapter 3, the Constitution of 1988 does not expressly regulate the possibility of limiting the retroactive effect of the decisions of unconstitutionality. This silence regarding the term *a quo* for the temporal effects of the decision of unconstitutionality is interpreted in the sense that this regulation was left to the Legislature. Under Brazilian law, however, the retroactivity of the decisions in the centralised judicial review of legislation has traditionally been the rule. Theoretically it fits better with the Brazilian declarative understanding to the unconstitutional laws. As also seen in Chapter 3, although this retroactive application is the rule in Brazil,

⁴⁵⁵ See *Reclamação* – Rcl 2256/RN – STF – Full Bench – *Rapporteur* Justice Gilmar Mendes – j. 11-9-2003 – DJ 30-4-2004 p. 34 – EMENT VOL-2149-04 p. 637; and *Reclamação* – Rcl-AgR 2381/MG – STF – Full Bench – *Rapporteur* Justice Carlos Britto – j. 6-11-2003 – DJ 2-4-2004 p. 10 – EMENT VOL-2146-03 p. 500.

scholars and judges have realised that in certain situations retroactive decision-making imposes unfair solutions: as everyone is expected to act in accordance with the laws, which are presumably constitutional, there is a need in maintaining the confidence in the relations established under the aegis of them.⁴⁵⁶ The mitigation of the general rule was inevitable, in favour of values such as good faith and legal certainty. And, despite the silence in the Federal Constitution and the absence of a statute regulating the matter until 1999, prospective decisions began to be adopted by the Supreme Court.

Since 1999, Law 9868/1999 has expressly authorised to give prospective effects to decisions in the centralised judicial review of legislation. The possibility of modulating the temporal effects of constitutional decisions is disciplined by its article 27 as follows: “In declaring the unconstitutionality of a law or normative act, the Supreme Court may, based on reasons of legal certainty or exceptional social interest, by a majority of two thirds of its members, restrict the effects of that statement or decide that it only has effectiveness from the *res judicata* or another moment it decides appropriate”.

Currently, based on this provision, the Federal Supreme Court has often refused to retrospectively change the law (notwithstanding the fact that it has expressed its disapproval over the normative act) and has pronounced that some of its understandings are to be followed just for future facts or acts to be performed after the respective decisions. In other cases, when announcing the rule, the Supreme Court has simultaneously indicated a precise date from which the new precedent should be applied. In these cases, for reasons of legal certainty or exceptional social interest, the law or the normative act will continue to be applied for a certain period of time fixed by the Supreme Court itself. The point is, if it is the case of its decision to be applied prospectively, as a rule, the Supreme Court does not leave the question of time effectiveness to be decided by the court where the same point of law can be discussed in the future (because, of course, with the possibility of different points of view about time effectiveness, this could affect the uniformity of the application of its understandings).

⁴⁵⁶ Despite the general rule of retroactivity, as seen in Chapter 3, at least since the 1940s, the Brazilian legal literature has defended the relativity of the doctrine of retroactivity of the effects of the decision in the judicial review of legislation. See Bittencourt (1949, pp. 148-149).

Basically, as briefly anticipated in Chapter 3, the decisions in Brazilian centralised judicial review of legislation, concerning their temporal effects, may be classified into two general categories: retrospective or prospective decisions. However, analysing the Supreme Court case law, it is possible to see some variants inside each of these two original matrixes. These variants aim, through minor adjustments, to overcome the problems existing in both options.

The following classification aims to cover the specifics of Brazilian law. In summary, in Brazil, it is possible to mention the following variants: (i) pure retroactivity; (ii) classical retroactivity; (iii) retroactivity at a specific time; (iv) pure prospectivity; (v) classical prospectivity; (iv) and prospectivity at a specific time. In the case of the three retrospective variants, the decision that affirms the unconstitutionality should be retroactively (*ex tunc*) applied to situations that occurred before and after it and, of course, be applied to the facts of the case in which it was pronounced (if it is a case of concrete judicial review of legislation). The difference is that in the case of pure retroactivity the decision that declares the unconstitutionality of the law will reach all the events that took place before and after the decision, including those already subject to *res judicata* and the statute of limitations.⁴⁵⁷ In the case of a classical retroactivity (certainly the most common in Brazil), the decision of unconstitutionality will be applied retroactively, since the time when the unconstitutional statute was enacted (*ex tunc*), reaching events that took place before and after it, but excluding those already subject to *res judicata* and the statute of limitations. Finally, the decision that affirms the unconstitutionality, in case of retroactivity at a specific time, will have the *dies a quo* of its application set retroactively to a certain date, considering the goals of the decision and reasons of exceptional social interest and legal certainty. Regarding the prospective matrix, there are also three variants. If it is the case of a pure prospectivity, the decision that affirms the unconstitutionality of the law, also considering reasons of legal certainty and exceptional social interest, will be applied *ex nunc*, reaching the situations that occurred after its pronouncement and, in the case of concrete judicial review, excluding even the facts of the case that gave rise to it (the decision). If it is the case of a classical prospectivity, the decision that affirms the unconstitutionality will be applied *ex nunc*, reaching the situations that occurred after its pronouncement and,

⁴⁵⁷ A solution that is, to say the least, extremely controversial. Concerning this issue, see Marinoni (2010b, pp. 445-456).

in the case of concrete judicial review, including the case that gave rise to it (the decision). Lastly, if it concerns the case of prospectivity at a specific time, the decision that affirms the unconstitutionality will have the *dies a quo* postponed to a future specific date or event, so that both the people and the Legislature will have time to evaluate the issue and make changes that are necessary.

The classification proposed can be illustrated with some binding decisions of the Federal Supreme Court in the centralised judicial review of legislation. For instance, in Direct Action of Unconstitutionality 1086/SC⁴⁵⁸ the Supreme Court declared the unconstitutionality of article 182, § 3º, of the Constitution of the state of Santa Catarina, which, in the limits of that state, waived the requirement of a prior environmental impact assessment for corporate projects of forestation and reforestation. The direct action of unconstitutionality was filed by the General Prosecutor of the Republic arguing that the provision of the Constitution of Santa Catarina State violated article 225, § 1º, IV, of the Federal Constitution, which determines that the Government should “demand, in the manner prescribed by law, for the installation of works and activities which may potentially cause significant degradation of the environment, a prior environmental impact study, which shall be made public”. In its decision, the Full Bench of the Supreme Court recognised that activities of forestation and reforestation may actually produce negative environmental impacts. Consequently, the waiver of article 182, § 3º, of the Constitution of the State of Santa materially violated the constitutional requirement of a prior environmental assessment. Besides, the Supreme Court also stated that considering the distribution of legislative power established by the Federal Constitution, only federal law could introduce waivers to the general rules of environmental conservation established in the Federal Constitution. As the issue in debate clearly falls under the category of the general rules of environmental conservation (and not under the category of complementary norms, which can be object of state legislation), article 182, § 3º, of the Constitution of the State of Santa Catarina also was formally unconstitutional. Thus, the Supreme Court in Full Bench, unanimously, declared the unconstitutionality of the state provision with classical retroactive effects.

⁴⁵⁸ *Ação Direta de Inconstitucionalidade* – ADI 1086/SC – STF – Full Bench – *Rapporteur* Justice Ilmar Galvão – j. 7-6-2001 – DJ 10-8-2001.

Conversely, in Direct Action of Unconstitutionality 1351/DF⁴⁵⁹ the Federal Supreme Court pronounced a decision with clear prospective effects. In this case, two Brazilian political parties (the *Partido Comunista do Brasil* - PCdoB and the *Partido Democrático Trabalhista* – PDT) filed a direct action of unconstitutionality, before the Supreme Court, against provisions of Law 9096/1995 (the Brazilian Law of Political Parties), mainly its article 57, which created a “performance clause” (also called a “barrier clause”) for the functioning of the Brazilian political parties. According to the main provision, briefly, a political party could only operate in the National Congress, enjoy access to free publicity on TV and radio as well as have access to the Parties’ Public Fund if it had obtained, in the last election, at least 5% of national votes and at least 2% of the votes per State in at least one third of the States (in both cases, excluding all the void and invalid votes). The petitioners argued that these requirements of Law 9096/1995 were in conflict with constitutional commandments such as the democratic regime, the plurality of parties and the principle of proportionality. The Full Bench of the Supreme Court unanimously declared unconstitutional the provisions of Law 9096/1995 related to the issue. However, by declaring the unconstitutionality of the questioned provisions, the Supreme Court faced a resulting normative vacuum. In order to surpass it, the Court, in a clear case of prospective decision at a specific time, based on the ideas of legal certainty and exceptional social interest, authorised by article 27 of Law 9868/1999), temporarily preserved the unconstitutional provision (precisely article 57 of Law 9096/1995), until the Parliament could enact new legislation consistent with constitutional commandments.

A prospective decision was also pronounced in Direct Action of Unconstitutionality 2501/MG.⁴⁶⁰ In this case, the General Prosecutor of the Republic alleged the unconstitutionality of § 1º, II, of article 82 (and, by extension, of paragraphs 4º, 5º and 6º of the same article 82) of the ADCT⁴⁶¹ of the Constitution of the State of Minas Gerais, as rewritten by State Constitutional Amendment 70/2005.

⁴⁵⁹ *Ação Direta de Inconstitucionalidade* – ADI 1351/DF – STF – Full Bench – *Rapporteur* Justice Marco Aurélio – j. 6-12-2006 – DJ 30-3-2007 PP-00068 – EMENT VOL-02270-01 PP-00019 REPUBLICAÇÃO: DJ 29-6-2007 PP-00031.

⁴⁶⁰ *Ação Direta de Inconstitucionalidade* – ADI 2501/MG – STF – Full Bench – *Rapporteur* Justice Joaquim Barbosa – j. 4-9-2008 – DJe-241 DIVULG 18-12-2008 PUBLIC 19-12-2008 – EMENT VOL-02346-01 PP-00074.

⁴⁶¹ This is the part of a constitution that establishes some transitional provisions in addition to its permanent main text.

These provisions attributed to the Board of Education of the State of Minas Gerais a broad pedagogical supervision upon all institutions of higher education of that State (public and private), which included the authorisation to operate, the accreditation of courses and the recognition of diplomas. The Federal Supreme Court declared unconstitutional the provisions of article 82 of the ADCT of the Constitution of the State of Minas Gerais. The Court stated that the questioned provisions had invaded the Union's constitutional attribution to legislate on guidelines and bases of education and to establish general rules on the matter (see Federal Constitution, articles 22, XXIV, and 24). It also stated that the authorisations to operate, the authorisations to launch new courses and the recognitions of diplomas, concerned with institutions of higher education, are of the responsibility of the Ministry of Education, in accordance with Law 9394/96 (the Federal Law of Directives and Bases of Education) and the Decree 5773/2006 (which regulates the matter). However, the Supreme Court, by majority, also based on arguments of legal certainty and exceptional social interest, gave prospective effects to its decision so that the diplomas and certificates issued by the institutions of higher education that had already started the courses by the date of the decision would be considered valid. With this exception and from that point, the Ministry of Education should perform its pedagogic supervision as established by the Constitution and the federal legislation. The Supreme Court took into account that thousands of students had attended or were attending courses offered by institutions of higher education created or authorised by the State of Minas Gerais. Balancing the constitutional provisions that provides the exclusive authority to the Federal Union to legislate on guidelines and bases of education and the fundamental right to education (under article 205 of the Federal Constitution), the Supreme Court gave greater prevalence to the latter, in order protect the fundamental rights of those who attended or were attending the courses of the institutions affected by its decision. The final result was a Supreme Court's decision declaring the unconstitutionality of the mentioned provisions (of the ADCT of the Constitution of the State of Minas Gerais) with prospective effects.

Another precedent where the Federal Supreme Court took into account the arguments of legal certainty and exceptional social interest to prospectively declare

the unconstitutionality of a law was Direct Action of Unconstitutionality 2240/BA.⁴⁶² In this case, the Brazilian *Partido dos Trabalhadores* – PT filed a Direct Action of Unconstitutionality before the Supreme Court against Law 7619/2000 of the State of Bahia, which has created the municipality of Luis Eduardo Magalhães by dismembering the district of the same name from the municipality of Barreiras. The *Partido dos Trabalhadores* – PT argued that State Law 7619/2000 had violated article 18, § 4º, of the Federal Constitution because it had created a municipality in a year when municipal elections were to be held and also because the federal complementary law – mentioned in article 18, § 4º, of the Federal Constitution, as necessary to establish the period during which states could create, incorporate, merge and dismember municipalities – had not yet been legislated by the National Congress. The Full Bench of the Supreme Court, based on its case law on the unconstitutionality of state laws that do not follow the determinations of article 18, § 4º, of the Federal Constitution, recognised the unconstitutionality of the questioned state law. However, balancing the doctrine of the nullity of the unconstitutional law and the arguments of legal certainty and exceptional social interest – in this case, the potential chaos that a retrospective declaration of unconstitutionality could bring to a municipality effectively established, *de jure* and *de facto*, for over six years –, the Full Bench of the Supreme Court, by majority, applying article 27 of Law 9868/1999, decided to act prospectively, maintaining the state law in force for a period of 24 months. This period was considered reasonable for state Parliament to reassess the whole issue taking into account the requirements to be established by the federal complementary law, according to the Supreme Court’s decision in the Direct Action of Unconstitutionality by omission 3682/MT.⁴⁶³

Reading these cases, it can be noted that, despite some criticism⁴⁶⁴, giving prospective effects to decisions in the centralised judicial review of legislation, has sometimes appeared to be the most convenient solution or even imperative. In some cases, the maintenance of the effects produced by the unconstitutional norm during its “constitutional” term safeguards the supremacy of the Constitution and the

⁴⁶² *Ação Direta de Inconstitucionalidade* – ADI 2240/BA – STF – Full Bench – *Rapporteur* Justice Eros Grau – j. 8-5-2007 – DJe-072 DIVULG 2-8-2007 PUBLIC 3-8-2007 – DJ 3-8-2007 PP-00029 – EMENT VOL-02283-02 PP-00279.

⁴⁶³ *Ação Direta de Inconstitucionalidade por Omissão* – ADIO 3682/MT – STF – Full Bench – *Rapporteur* Justice Gilmar Mendes – j. 9-5-2007 – DJ 6-9-2007 PP-037

⁴⁶⁴ This criticism was mentioned in Chapter 3. See also Souza (2006, pp. 160-163).

principles and rights that it encapsulates further than an unconditional assignment of retrospective effects to the decision that affirms the norm unconstitutional.

Finally, a very important practical reason should also be mentioned in favour of the possibility of prospective effects in the Supreme Court's decisions in concentrated judicial review of legislation: as a matter of legal policy, if maintained, *a priori*, only the possibility of retroactive effects (*ex tunc*) to the Federal Supreme Court's decision that affirms the unconstitutionality of a norm, the Court – that is, after all, the “Brazilian Constitutional Court”, which deals with both legal and political questions – would be more conservative. Conversely, open the possibility of limiting the impact of the decision, in order to not reach situations prior to the decision itself, the Supreme Court feels liberated from any constraint to affirm the unconstitutionality, when it understands that this is the correct measure, because the decision will not supposedly affect people who acted relying on the (un)constitutional norm.

Technically, however, this choice between a retroactive or prospective application of the decision of (un)constitutionality is, under article 27 of Law 9868/99, indispensably linked with the definition of the vague concepts of legal certainty and exceptional social interest as fully explained in Chapter 3. The retroactivity remains the rule concerning the temporal effects of the declaration of unconstitutionality; prospectivity, the exception.⁴⁶⁵ In interpreting article 27 of Law 9868/99, the Federal Supreme Court has stated that the definition of the temporal effects of its decisions should always take into consideration the fundamental rights of the citizens. Legal certainty is also an argument to be invoked in order to protect the rights of citizens (and not to defend the interests of the Brazilian state). Thus, prospective effects must take place after careful deliberation that concludes to safeguard the idea of

⁴⁶⁵ Brazilian's centralised judicial review of legislation, as already seen, also allows the concession of preventive measures to prevent the harmful effects of inferior court decisions (or of administrative behaviour) against what perhaps might be decided by the Federal Supreme Court in the final decision of the direct action. Since *Ação Declaratória de Constitucionalidade* – ADC-MC 4/DF – STF – Full Bench – *Rapporteur* Justice Sydney Sanches – j. 11-2-1998 – DJ 21-5-1999 – EMENT 1951-1 – RTJ 169 pp. 383-437, the Federal Supreme Court has understood that the preventive measure will immediately bind the other courts, which are dealing with the constitutionality of the same act. The inferior courts, to the extent of the preventive measure, will be prohibited to apply, in appreciating the concrete cases, diverse understanding of that adopted by the Federal Supreme Court. In the case of preventive measures, however, the rule is that the decisions will have *ex nunc* (prospective) effects, unless the Court considers that it should grant retroactive effects (Law 9868/999, article 11, §1º). According to Law 9868/99, article 21, in the case of a declaratory action of constitutionality, the Federal Supreme Court can also, as a provisional measure, suspend the various cases on the same controversial theme throughout the country until the direct action's final decision.

legal certainty and one or more constitutional principles characterised as of exceptional social interest.

Brazilian Binding Precedents

	Revoked	In Force	Related to All courts	Related to the Specialised Courts	Related to Some Specific Courts	Internally or Non-Universally Binding	Universally Binding
The <i>Assentos</i>	X				X		X
The Labour Courts' <i>Prejulgados</i>	X			X		X	
The Labour Normative Sentence		X		X		X	
The Electoral Courts' <i>Prejulgados</i>	X			X		X	
The Resolutions of the Electoral Courts		X		X		X	
The Incident of Standardisation of Case Law of the Code of Civil Procedure		X	X			X	
The Incident of Standardisation of Case Law of the Federal Small Claim Courts		X			X ⁴⁶⁶	X	
The Case of Multiplicity of Special Appeals Based upon a Similar Question of Law		X			X ⁴⁶⁷	X	
The Incident to Declare an Unconstitutionality in the Decentralised Judicial Review of Legislation		X	X ⁴⁶⁸			X	
The Issue of the General Repercussion in Extraordinary Appeals		X			X ⁴⁶⁹	X	
Decisions in the Centralised Judicial Review of Legislation		X			X ⁴⁷⁰		X
<i>Súmulas</i>		X	X			X	
The Supreme Court's Binding <i>Súmula</i>		X			X ⁴⁷¹		X

⁴⁶⁶ Related to the Federal Small Claim Courts.

⁴⁶⁷ Related to the Superior Court of Justice.

⁴⁶⁸ All collegiate courts.

⁴⁶⁹ Related to the Federal Supreme Court.

⁴⁷⁰ Related to the Federal Supreme Court.

⁴⁷¹ Related to the Federal Supreme Court.

5 The Brazilian Model of Binding *Súmula*

5.1 General considerations

For decades the development of Brazilian law has been influenced by the civil law tradition with codes and statutes being the main sources in the legal system. However, as already seen, in spite of having this civil law background, Brazil has not been immune to the influence of binding precedents. Recently, Brazil has been developing a legal system that is becoming more similar to that of countries that abide by common law. Progressively, it is believed, Brazil can become a new example of a mixed system or what might be known as a country related to the “new” Western legal family, with both statutes and precedents playing equal roles in the legal system.

Law-makers in Brazil are developing a system of precedents – hybrid and dynamic and apt to give judges resources to bindingly take into consideration when judging a case. One of these resources is the new and very important Federal Supreme Court Binding *Súmula*. According to the new article 103-A of the Brazilian Constitution (with the text given by Constitutional Amendment 45, passed in 2004), the Supreme Court is allowed to issue a Binding *Súmula* that represents, by means of several statements, its consolidated case law. All other courts and the public Administration are hence obliged to follow these understandings of the Supreme Court *Súmula*.

The new model of Binding *Súmula*, although not yet thoroughly investigated in Brazil, will have a deep impact on the Brazilian judicial system (mainly on the judicial review of legislation), as the present chapter will attempt to show together with the possible impact that this Brazilian experience might have on the wider doctrine of precedent. Specifically, the purpose of this chapter is to present this new Brazilian category of binding precedent, analysing its origins, features and significance under a dual perspective that could be interesting and useful for both common and civil law traditions.

5.2 The Brazilian Supreme Court *Súmula*: Origin, Definition and Merits

The *Súmula* of a court refers to a set of case law that dominates the court, including the various branches of law, organised by numbered annotations related to defined legal themes. Each numbered annotation, which expresses the understanding of the court about a determined question of the law, should be called, technically, a statement.⁴⁷² The Supreme Court *Súmula*, in its classical form, was created during the 1960s as a non-binding or persuasive *súmula*. Suffocated by an accumulation of cases pending judgement, the vast majority about identical questions, the Supreme Court, in 1963, decided to officially compile and publish the summary of its case law. The Court, after amending its Internal Regulation (session of 30 August 1963) and a massive work of the Case Law Commission⁴⁷³, at the session of 13 December 1963, officially published the first statements of its *Súmula* to take affect from 1 March 1964. The issue of the *Súmula* – that is, its many first individual statements – was the result of a specific formulation process, which went through a choice of themes, a technical judicial discussion, approval, and finally publication so that everyone could know about it and its validity.^{474,475}

The creation of the *Súmula*, primarily in the Federal Supreme Court, was (i) an answer to the large number of cases, and sought, thus, to guarantee greater speed in judicial decisions. However, there were other motives for the adoption of the *Súmula*. (ii) One of them is the fact that the *Súmula* provides a greater degree of certainty to the law. Through the *Súmula*, the Supreme Court's consolidated (but not immutable)⁴⁷⁶ case law on various legal themes is identified rapidly. Individually,

⁴⁷² See Rocha, Lincoln Magalhães da. *Direito sumular: uma experiência vitoriosa do Poder Judiciário* (Rio de Janeiro, Shogun, 1983), p. 100. See also Souza (2011, pp. 169-171).

⁴⁷³ Composed by Justices Gonçalves de Oliveira, Pedro Chaves and Victor Nunes Leal, the latter being the *Súmula*'s great mentor.

⁴⁷⁴ See Souza, Carlos Aurélio Motta de. *Segurança jurídica e jurisprudência: um enfoque filosófico-jurídico* (São Paulo, LTr, 1996), p. 142. See also Tavares (2007, pp. 49-52).

⁴⁷⁵ In the Russian system there is a similar type of judicial practice: the Supreme Court's Interpretative Guidelines addressed to inferior courts. According to Henderson, "these are interesting and, although not quite unique in the world, are deeply rooted in Russian tradition. They were the means by which the Ruling Senate historically made law in the Russian Empire. They were developed and widely used during the soviet era. Interpretative guidelines are a powerful tool as they allow courts to address an issue at any time, rather than being required to await a concrete dispute that raises this legal point". See Henderson, Jane. Judicial Law-making in Post-Soviet Russia [Book Review] (2009) 20(2) *King's Law Journal*, pp. 374.

⁴⁷⁶ In accordance with article 103 of the Supreme Court Internal Regulations, "any of the Justices may propose the revision of the statements of the *Súmula*".

each one of the *Súmula* statements covers a determined aspect of the law, or fills an empty space left by it, with an interpretation that is considered to be consolidated. It contributes, point by point, to the certainty of the law in the resolution of present and future litigations. Secondly, (iii) there is the principle of equality: the *Súmula*, even if it does not end, it at least sufficiently mitigates the variation of interpretations on determined questions of the law. In other words, it contributes to the application of the same rule for similar cases, which results in equal treatment for all in the same conditions.^{477,478}

In addition, two characteristics deserve to be highlighted regarding the origin of the Brazilian *Súmula*: its origin is not legislative, but judicial, certainly the fruit of a specific situation which the Supreme Court was going through in the 1960s; and secondly the fact that, as a logical consequence of its “judicial” origin, the possibility of issuing it was restricted in the 1960s to the Supreme Court itself. In fact, the first legislative provision, as well as the extension to the other courts of the possibility of issuing *súmulas*, only appeared with the incident to standardise the case law of the 1973 Brazilian Civil Procedure Code (article 479), which states that “the judgement, made by the vote of the absolute majority of the members of the Court, will be subject of *Súmula* and shall constitute a precedent for standardisation of the internal case law”.⁴⁷⁹

Progressively, following the creation of the Federal Supreme Court’s *Súmula*, most Brazilian courts have established their own *súmulas*. As a rule, the statements of these *súmulas*, representing the understanding of the court as a whole on various subjects, under the internal regulations of each court, are created to bind the future decisions of the emitting court. Indeed, in Brazil, a judicial court (for instance, the Superior Court of Justice or the Appellate Court of the State of Rio de Janeiro) is only one body, although it is composed of several judges and can be divided, for functional purposes, into smaller bodies or panels. Consequently, the idea is that the

⁴⁷⁷ Listing the motives for the adoption of the binding *Súmula*, which are approximately the same, see Silva (2005, p. 117).

⁴⁷⁸ According to Sampaio (1985b, p. 14), the Federal Supreme Court’s classical *Súmula*, which is not legally binding, has character of “a *stare decisis de facto*”. Judges tends to follow it due to the Supreme Court’s prestige, the almost futility of the lower courts deciding against the *Súmula*, and also because they do not like to see their decisions reversed.

⁴⁷⁹ Currently, for instance, all Brazilian superior courts have their own *Súmula*, but not universally binding.

judges and the panels must follow the understanding of the court as a whole, represented by the *súmula* of its case law.

The internal regulation of the Superior Court of Justice, article 34, XVIII, for instance, states that one of the *rapporteur's* duties is to preliminarily deny a special appeal that is in opposition to the Court's *Súmula*. And article 124 of the same Regulation states that the citation of a statement of the *Súmula*, with its corresponding number, will dismiss, before the court, the reference to other judgements in the same sense.

Currently, these rules establishing the internal bindingness of the courts to its own *súmulas* (which are the expression of the certainty of law within a court) have full legislative support in the sole paragraph of article 481 of the Civil Procedure Code (by the new text given by Law 9576/1998), applicable to any Brazilian court: "The judgement, made by the vote of the absolute majority of the members of the Court, will be incorporated into the *súmula* and will constitute a precedent for standardisation of case law". The emitting court as a whole and its members individually must follow the binding statements of its own *súmula* until these are properly cancelled or modified under the appropriated rules.

Furthermore, following the tendency to increase the importance of precedents, the provisions of Laws 8038/1990 and 9576/1998 (the latter altered the Civil Procedure Code, article 557, *caput* and §1º-A) have created a kind of indirect and external binding effect to the *súmulas* and the (dominant) case law of the Federal Supreme Court and of the Superior Courts. According to the current article 557, *caput* and §1º-A, of the Civil Procedure Code, for instance, in a collegiate court, the *rapporteur* (by a monocratic decision, without consulting the panel) will not admit an appeal which is conflicting with the *súmula* or the (dominant) case law of the Federal Supreme Court and of one of the Superior Courts. The same provision also states that, if the appealed decision is in clear conflict with the *súmula* or the (dominant) case law of the Federal Supreme Court and of a Superior Court, the *rapporteur* may directly (without consulting the panel) grant the appeal.⁴⁸⁰ These legislative provisions are providing what can be called an indirect and external binding effect to Brazilian case law, since the courts now are not bound only by its

⁴⁸⁰These decisions, however, according to §1 of article 557 of the Civil Procedural Code, are subjected to an internal interlocutory appeal to submit the question, if it is petitioned, to the appropriate panel.

own *súmulas*, but also by the Federal Supreme Court's and Superior Courts' *súmulas* and (dominant) case law.

5.3 Towards a Binding *Súmula*: the Functional Aspects of the New Model

(i) First Considerations

The legal parameters of the Brazilian Binding *Súmula* have already been established: primarily, by article 2º of Constitutional Amendment 45/2004 that created the new article 103-A in the Brazilian Federal Constitution and the new Binding *Súmula*; secondly, by Law 11417/2006, which regulates the various aspects of this issue, such as the procedure for approval, revision and cancellation of the *Súmula*.

With respect to article 2º of Constitutional Amendment 45/2004, the following article 103-A was added to the Federal Constitution:

Article 103-A. The Supreme Federal Court shall have the power to, by its own initiative or by provocation, by means of a decision taken by two thirds of their members, after reiterated decisions about constitutional matters, approve *Súmula* which, after publication in official gazettes, shall have a binding effect over the other bodies of the Judiciary Power, over direct and indirect public Administration, at federal, state and municipal levels, as well as proceeding to their revision or cancelling, in the manner provided for in law.

§1º. The *Súmula* shall have as subject the validity, the interpretation and the efficacy of specific norms, about which there are actual controversies between judiciary bodies or between these and the public Administration which cause serious juridical instability and relevant multiplication of lawsuits over identical matters.

§2º. Without prejudice of the provisions of law, the approval, revision or cancelling of *Súmula* may be provoked by those parties which may propose the direct actions of unconstitutionality.

§3º. Any administrative act or judicial decision which goes against an applicable *Súmula* or applies it in an undue manner shall be contested before the Supreme Federal Court which, considering the contestation reasonable shall nullify the administrative act or revoke the judicial decision and determine their substitution with or without the application of the *Súmula*, as the case may require.

As was mentioned in Chapter 2, the creation of the Binding *Súmula* by the new article 103-A of the Brazilian Federal Constitution gave a great impulse to what is currently called in Brazil the “objectivation” of the decentralised (“*difuso*”) judicial

review of legislation performed by the Federal Supreme Court. Unlike the centralised judicial review of legislation, in which only abstract constitutional issues are discussed, the Supreme Court new binding statements result from numerous concrete cases in the decentralised judicial review of legislation. The incorporation of a statement in Binding *Súmula* of the Supreme Court is the climax of the Brazilian decentralised judicial review of legislation, the last stage of a long journey, which usually reaches the Supreme Court via an extraordinary appeal. Clearly, Binding *Súmula* has established a point of convergence between the centralised and decentralised models of judicial review in Brazil concerning the bindingness of their decisions.⁴⁸¹

Following the constitutional reform of 2004, Law 11417/2006 was promulgated to regulate several aspects of the Binding *Súmula*, such as the procedure for approval, revision and cancellation of the statements.

(ii) The Role of the Supreme Court and the Requirements for Issuing a Binding Súmula Statement

The jurisdiction to issue the Binding *Súmula* (and consequently, its statements) is restricted to the Supreme Court (article 103-A of the Federal Constitution and article 2º of Law 11417/2006). The Constitution also says that the Binding *Súmula* shall have as subject the validity, the interpretation and the efficacy of specific norms, about which there are actual controversies between judiciary bodies or between these and the public Administration which cause serious juridical instability and relevant multiplication of lawsuits over identical matters (see article 103-A, § 1º).

It is necessary, therefore, to fulfil the objective requirements established by article 103-A of the Constitution (regulated by article 2º, *caput* and § 1º, of Law 11476/2006) for issuing a binding statement, which are: a) the occurrence of repeated decisions of the Supreme Court on a given constitutional matter (*caput*); b) current controversy among judicial organs or between these organs and the public Administration about this matter (§ 1º); c) current controversy about validity, interpretation or efficacy of specific norms (§ 1º); d) and the controversy causes

⁴⁸¹ See Tavares (2007, pp. 69-72) and Leite (2007, pp. 13 and 21).

severe judicial insecurity and relevant multiplication of cases concerning the same question (§ 1º).⁴⁸²

As for the occurrence of repeated decisions on constitutional matters, there is not a pre-determined number of decisions which objectively imply the fulfilment of this requirement. It is enough that the repetition demonstrates that the judicial question is sufficiently debated and, therefore, ready in the Supreme Court for a definitive solution. Thus, a binding statement should be the result of a wide debate that happened in previous decisions and not only a simple creation of a judicial rule by the Court to regulate an occasional divergence.

The second requirement is the existence of a current controversy among judicial bodies or between them and the public Administration. Nothing is more natural: a binding statement is not necessary if the question is not controversial or if this controversy, for any reason, is no longer present.

There must be a type of controversy about the validity, interpretation or efficacy of specific norms. In general terms, according to Supreme Court case law, a controversy about validity in the constitutional area means the divergence about the constitutionality of a concrete infra-constitutional norm. A controversy about interpretation is a disagreement about the best meaning of certain provisions according to the constitutional rules. A controversy about efficacy is a dissent about social coercion of some norms in time and space.⁴⁸³

Finally, the controversy must cause severe judicial insecurity and relevant multiplication of cases about the same question. Multiplication of cases is something easy to verify and is very common in the Brazilian legal system. However, verifying the severity of the judicial insecurity is not so easy because, linguistically, it is a vague concept, i.e., its semantic reference is not so precise. Nevertheless, it can be assumed, in principle, that the Federal Supreme Court is only in charge of questions that are indeed severe and important, especially since the new § 3º of art. 102 of the Federal Constitution, which requires, to extraordinary appeals, the demonstration of the general repercussion of the questions debated in the case. Besides, the very multiplication of cases, if it creates diverging decisions, inevitably causes severe

⁴⁸² See Lamy, Marcelo and Conci, Luiz Guilherme Arcaro. Reflexões sobre as súmulas vinculantes. In Tavares, André Ramos; Lenza, Pedro and Alarcón, Pietro de Jesús Lora. *Reforma do Judiciário* (São Paulo, Método, 2005), p. 308.

⁴⁸³ Lamy and Conci (2005, p. 309).

judicial insecurity, since the parties cannot identify in judicial decisions the necessary reference to know what is right or wrong in their behaviour.⁴⁸⁴

(iii) Quorum for Approval

According to article 103-A of the Federal Constitution and article 2º, § 3º, of Law 11417/2006, the statement approval will take place by a decision of two thirds of the members of the court. Thus, the binding statement approval happens with a decision of at least eight of the eleven Justices of the Supreme Court.⁴⁸⁵

It is reasonable that the minimum quorum for approval is constituted by a qualified majority of votes, but not the unanimity, in particular to avoid unnecessary impasses. Despite this, in exceptional cases, nothing prevents the Supreme Court to seek, for some time and through debates, a consensus text for the statement which meets the understanding of all its Justices and could be, thus, the result of unanimity.

(iv) Objective Limits

The Binding *Súmula*, in principle, has the same features that the non-binding *Súmula* has. Each statement is a summary, whose content is eminently juridical (that consists only in interpreting a question of law), of several previous decisions in the same sense, without statements *a latere* (known in the theory of *stare decisis* as *obiter dicta*), and furthermore all of its contents are considered essential. A statement is an abstract and a generic norm and, thus, an undetermined number of concrete cases can be subsumed under the generality of its terms, since the question of law that is discussed in them is the same. The difference in relation with the classical *Súmula* is that, if this happens – the case deals with a legal theme that was already incorporated into the Binding *Súmula* –, the application of the respective statement, by the judge or by the Administration, becomes binding.

Article 103-A, § 1º, of the Federal Constitution (as well as article 2º, § 1º, of Law 11417/2006) makes it clear that the Binding *Súmula* will have as a goal to

⁴⁸⁴ Concerning the issue, see also Tavares (2007, pp. 135-139) and Leite (2007, pp. 31-34).

⁴⁸⁵ See Leite (2007, pp. 50-51) and Tavares (2007, pp. 139-140).

define the Court understanding about the validity, interpretation and efficacy of norms, disregarding questions of fact. Indeed, it is a problem of both rationality and operation. It is absolutely indispensable that there is a notion of what can be abridged.⁴⁸⁶ As Lamy points out, the richness of daily life situations makes the use of a binding statement impossible in cases that refer to questions essentially to do with facts. Questions essentially of fact are decided according to the ascertainment of facts of the case, and this variable richness has a complexity that is impossible to be reduced to direct statements.⁴⁸⁷

It is also important to be reminded that not all questions of law can be the subject of a binding statement. The Constitutional Amendment 45/2004 (see article 103-A of the Federal Constitution) allowed the Supreme Court to issue binding statements in questions related to constitutional law.⁴⁸⁸ The issue is usually also about another area of law (tax law or administrative law, for instance), but it must have constitutional contents.⁴⁸⁹ It should be added that some branches of law are more compatible with the *Súmula* statements, while others are not. In the first group, tax law and administrative law for example, can be cited. Generally, despite the complexity of their questions of law, the questions of fact are not of great complexity. But there are some areas of law, such as criminal law, in which, besides comprising of tortuous questions of law, the questions of fact are almost always very complex and deeply casuistic, preventing the issuing of binding statements or at least making it difficult to do so. To illustrate, (i) Statement 3 of the Federal Supreme Court's Biding *Súmula* deals with the Rule of Law and the right of a full defence under administrative law and social security law;⁴⁹⁰ (ii) Similarly, Statement 5 involves administrative law and the absence of technical defence provided by a lawyer in a disciplinary administrative case;⁴⁹¹ (iii) Statement 8 involves tax law and the statute

⁴⁸⁶ See Wambier, Teresa Arruda Alvim. *Súmula vinculante: desastre ou solução?* *Revista de Processo*, n. 98, abr/jun 2000b, p. 302.

⁴⁸⁷ See Lamy, Eduardo de Avelar. *Súmula vinculante: um desafio.* *Revista de Processo*, n. 120, fev 2005, p. 130.

⁴⁸⁸ See Schäfer (2012, p. 35) and Medina, José Miguel Garcia; Wambier, Luiz Rodrigues and Wambier, Teresa Arruda Alvim. *Repercussão geral e súmula vinculante – Relevantes novidades trazidas pela EC. 45/2004.* In Wambier, Teresa Arruda Alvim et al. (coords). *Reforma do Judiciário: primeiros ensaios críticos sobre a EC n. 45/2004* (São Paulo, RT, 2005), p. 378.

⁴⁸⁹ See Leite (2007, p. 14).

⁴⁹⁰ Judgment of 30-5-2007 – DJe 6-6-2007 p. 1 – DJ 6-6-2007 p. 1.

⁴⁹¹ Judgment of 7-5-2008 – DJe 16-5-2008 p. 1 – DJ 16-5-2008 p. 1.

of limitation;⁴⁹² (iv) Statement 10 deals with judicial review of legislation and procedural law;⁴⁹³ (v) Statement 11 involves administrative law, criminal procedural law and rightness of police procedures (specifically, the limits for the use of handcuffs);⁴⁹⁴ (vi) and Statement 13 involves administrative law and the nepotism in public administration.^{495,496}

Finally, it is necessary to highlight the fact that, for the binding *Súmula* to work efficiently, the composing technique of its statements must be precise, and especially avoid “vague concepts” – for instance, expressions such as “reasonable”, which is widely used in common law England – that make conflicting interpretations of the judicial norm possible.⁴⁹⁷ Indisputably, a single binding statement should be, as much as possible, short, direct and clear.⁴⁹⁸

(v) Subjective Limits

Article 103-A of the Federal Constitution (as well as article 2º of Law 11417/2006) determines that the *Súmula* of the Federal Supreme Court will bind all the other organs of the Judicial Power and the Administration at federal, state, federal district and municipal levels.

The constitutional text certainly suggests that the Federal Supreme Court is not bound by its own *Súmula*. Technically, this can be supported, since it would be absurd if there was a *Reclamação* before the Federal Supreme Court to guarantee the authority of its *Súmula*, which was disregarded by the Supreme Court itself, and the *Reclamação* possibility is the main practical consequence of the binding effect. But this does not mean that the Supreme Court must not follow its binding

⁴⁹² Judgment of 12-6-2008 – DJe 20-6-2008 p. 1 – DJ 20-6-2008 p. 1.

⁴⁹³ Judgment of 18-6-2008 – DJe 27-6-2008 p. 1 – DJ 27-6-2008 p. 1.

⁴⁹⁴ Judgment of 13-8-2007 – DJe 22-8-2008 p. 1 – DJ 22-8-2008 p. 1.

⁴⁹⁵ Judgment of 21-8-2007 – DJe 29-8-2008 p. 1 – DJ 29-8-2008 p. 1.

⁴⁹⁶ See appendices with all thirty-one statements of the Federal Supreme Court *Binding Súmula* or go to: http://www.stf.jus.br/arquivo/cms/jurisprudenciaSumulaVinculante/anexo/Enunciados_Sumula_Vinculante_STF_1_a_29_31_e_32.pdf.

⁴⁹⁷ See Lamy (2005, p. 131).

⁴⁹⁸ See Schäfer (2012, p. 125).

statements. The Supreme Court must do so – both as a collective body as well as its individual members – until the statement is properly revised or revoked.⁴⁹⁹

As for the public Administration, administrators are expected to not act in opposition to what was defined in the Binding *Súmula*. Certainly, this will decrease the amount of litigation where the public Administration is one of the litigants. It should be noted that, in Brazil, the vast majority of cases in which the Administration litigates today are concerned with tax and welfare law questions (with constitutional contents too), and the solutions for these law questions have already been given many times by the Supreme Court.

Conversely, the Legislative Power, exercising its typical function, will not be bound by the *Súmula*. This clearly derives from the reformed constitutional text that, with regards to the binding effect of *Súmula*, it does not refer, at any point, to the National Congress, which can legislate in opposition to what the *Súmula* states.^{500,501}

(vi) The Legitimacy to Provoke the Supreme Court and the Procedure

The Federal Supreme Court can approve, revise or cancel statements of its *Súmula* by its own initiative or by external provocation (article 103-A, *caput* and § 2º, of the Federal Constitution and article 3º of Law 11417/06). By its own initiative, the proposition can be made by one (or more) of its Justices.⁵⁰² As for the external provocation, article 103-A, § 2º, of the Constitution states that, without prejudice of the provisions of law, the approval, revision or cancelling of *Súmula* may be provoked by those who may file an action of unconstitutionality. The infra-constitutional law-makers increased the list of authorities and agencies that may provoke the issue, revision or cancellation of statements. According to the constitutional text and Law 11417/06 (article 3º), the following may initiate the procedure: the President of the Republic; the Directing Board of the Federal Senate; the Directing Board of the Chamber of Deputies; the General Prosecutor of the Republic; the Federal Council of the Brazilian Bar Association; the Public Defender-General of the Union; a political party represented in the National Congress; a

⁴⁹⁹ See Leite (2007, pp. 38-39) and Tavares (2007, pp. 167-169).

⁵⁰⁰ See Tavares (2007, pp. 169-175).

⁵⁰¹ Of course, the National Congress may act within the constitutional limits.

⁵⁰² See Internal Statute of the Federal Supreme Court, article 103.

confederation of labour unions or a professional association of a nation-wide nature; a Directing Board of a State Legislative Assembly or of the Federal District Legislative Chamber; a Governor of State or of the Federal District; the Superior Courts, State Courts of Justice, Federal District and Territories Court of Justice; Regional Federal Courts, Regional Labour Courts, Regional Electoral Courts and Military Courts.

As it occurs with the direct action of unconstitutionality, for this provocation to be considered as “legitimate”, the Federal Supreme Court, in some cases, must analyse if the matter of the proposed binding statement has a thematic pertinence to institutional purposes of the supposed legitimate plaintiff. In other words, according to the case law of the Supreme Court, some potential plaintiffs must demonstrate not only the objective requirements established by article 103-A of the Constitution (regulated by Law 11476/2006, article 2º, *caput* and § 1º) for issuing a binding statement, but also a relation of pertinence between the proposed binding statement and their institutional activities.⁵⁰³ Basically, according to the case law of the Supreme Court (on the direct action of unconstitutionality), they are: the confederations of labour unions or the professional associations of a nation-wide nature; the Directing Boards of the State Legislative Assemblies or of the Federal District Legislative Chamber; the Governors of State or of the Federal District; the State Courts of Justice and the Federal District and Territories Court of Justice; and some Military Courts.

According to Law 11417/2006, article 3º, § 1º, a municipality may also file a proposal to initiate a procedure to approve, revise or cancel a binding statement, since it is done within a concrete case in which this municipality is a party and demonstrates the requirements of article 2º, § 1º, of Law 11417/2006.⁵⁰⁴

Following a line of democratization of the debate on the subjects under analysis before the Federal Supreme Court, Law 11417/2006, article 3º, § 2º, *in fine*, also allows the participation of third parties – kind of *amicus curiae* – in the procedure for issuing, revising or cancelling binding statements. This kind of intervention does not have the same nature of the interventions provided by the Brazilian Civil Procedure Code. In the case of the Civil Procedure Code, for the

⁵⁰³ See Federal Supreme Court’s decision in the Proposta de Súmula Vinculante – PSV 11/DF – *Rapporteur* Justice Carlos Britto – j. 28-5-2009 – DJe-103 Divulg 3-6-2009 Public 4-6-2009.

⁵⁰⁴ See Tavares (2007, p. 59).

intervention of a third party, who is not a participant of the original lawsuit, a subjective interest is always required, once the third party is (or would be) indirectly affected by the decision eventually proffered. Conversely, considering the objectivity of the procedure for issuing, revising and cancelling binding statements by the Federal Supreme Court, this kind of personal interest is not taken in consideration in the case of the Binding *Súmula*'s *amicus curiae*'s intervention. The intervention of a third party (*amicus curiae*) in the procedure for issuing, revising or cancelling of binding statements must be linked and restricted only to the presentation and support of a legal opinion about the validity, the interpretation and the efficacy of specific norms. The acceptance of the intervention is submitted to the *rapporteur*'s decision.

Once the procedure has an objective nature, which only aims to fix a generalisation of the court practice, there is no legitimate defendant. Besides, no legal provision exists that determines the requesting of information from the body responsible for the enactment of the norm linked with the potential statement.

In general terms, according to Law 11417/2006 and the Supreme Court Internal Regulation⁵⁰⁵, by its own initiative or by external provocation, the Federal Supreme Court must follow this procedure concerning its Binding *Súmula*:⁵⁰⁶ (i) Firstly, the Supreme Court must enable the intervention of the General Prosecutor of the Republic in propositions which are not of his initiative, before the issue, revision or revocation of the binding statement can take place; (ii) Secondly, during the procedure for issuing, revising or revoking a binding statement, the *rapporteur* may accept, through a non-appealable decision, the intervention of the *amicus curiae*; (iii) The proposition of issue, revision or revocation of a binding statement does not authorise the suspension of judicial cases in which the same question is debated; (iv) The issue, revision or revocation of a statement with a binding effect will depend on decisions made by two thirds of the members of the Federal Supreme Court in a plenary session (Law 11417/2006, article 2º, § 3º); (v) After the decision, the binding statement will have immediate effect, but the Supreme Court, also with a decision made by two thirds of its members, based on reasons of exceptional public interest,

⁵⁰⁵ Concerning the Supreme Court Internal Statute as the subsidiary norm to regulate the issue of the binding *Súmula*, see Leite (2007, pp. 99-100).

⁵⁰⁶ Federal Supreme Court's Resolution 381/2008 (of 29-10-2008, published in DJe of 31-10-2008) created a new procedural class, called "*Proposta de Súmula Vinculante*" or "*PSV*", focusing on the Binding *Súmula*.

can restrain the binding effects or decide that they will only have effects from another moment (Law 11417/2006, article 4º); (vi) In a term of 10 days after the session in which a statement with binding effect was issued, revised or cancelled, the Supreme Court will publish, in a special session of the official press, the terms of the respective statement (Law 11417/2006, § 4º);^{507,508} (vii) Finally, in the case of a statute that is linked with a binding statement is cancelled or changed, the Supreme Court, by its own initiative or external provocation, must revoke or revise the respective statement.

The Federal Supreme Court's Internal Regulation (article 32) and Resolution 388/2008⁵⁰⁹ (article 1º) also require the intervention of the Court's Commission of Case Law in this atypical procedural class, which will analyse the matter and propose a decision, to the Full Bench, concerning the issue (or not) of the binding statement. However, the Supreme Court has sometimes expedited the issue of binding statements, since some binding statements were issued directly by the Full Bench of the Supreme Court, without the discussion going previously through the analysis of Court's Commission of Case Law. It is true that there is some resistance to this swifter procedure, but the understanding that the Full Bench of the Court absorbs the jurisdiction of all its commissions, enabling it (the Full Bench) to carry out this more informal and faster procedure, has clearly prevailed.

(vii) Time Efficacy, Revision and Cancellation

Article 103-A of the Federal Constitution and article 4º of Law 11417/2006 are explicit when they state that, since publication in the official press, the statement will bind all other bodies of the Judiciary and the public Administration in general. It is important to note that this efficacy, as a rule, retracts in time, i.e., is *ex tunc*, preserving, of course, the *res judicata*.

However, article 4º of Law 11417/2006 allows the Federal Supreme Court to modulate the temporal efficacy of the binding statement, according to the court's

⁵⁰⁷ See Tavares (2007, p. 152).

⁵⁰⁸ They are also available by a simple internet search at the Supreme Court website: <http://www.stf.jus.br/portal/cms/verTexto.asp?servico=jurisprudenciaSumulaVinculante>. Accessed 23 July 2012.

⁵⁰⁹ Of 5-12-2008, published in DJe of 10-12-2008.

discretion, observing the potential repercussions of the particular statement. As it is permitted in the centralised judicial review of legislation (Law 9868/1999), the Supreme Court, by decision of two thirds of its members (eight Justices), may decide that it shall go into effect from another moment, due to reasons of legal certainty and of relevant public interest.⁵¹⁰

On the other hand, Law 11417/2006 also permits to restrict the effect of the binding statement, presumably to limit the subjective effects of the statement only to certain bodies or entities of the (federal, state or municipal) public Administration, according to the case. At least, this is the most common interpretation of the letter of the law. This provision, although there is no definitive position of the Federal Supreme Court, is of disputable constitutionality because it can offend, among other things, the constitutional principle of equality of all before the law (Brazilian Constitution's article 5º, *caput*).⁵¹¹

Furthermore, article 5º of Law 11417/2006 states the possibility of revision or cancellation of a binding statement, which, for any reason, becomes incompatible with the legislative norms (including the Constitution). The Supreme Court can revise or cancel the statement by its own initiative or by external proposition.⁵¹²

In fact, it is absurd to think that the making of laws would always conform to the binding statements of the *Súmula* of the Federal Supreme Court. This would mean that the Constitutional Reform of 2004 had created a Judiciary supremacy over the Legislative Power. The legislative activity will continue to be fully active within the existing constitutional limits.⁵¹³ As will be shown later in this Chapter, in the Brazilian legal system, which is related to the civil law tradition, the validity of a statement (either binding or non-binding) depends on the support that it has from the legislated norm. In short, a binding statement's stability depends on the stability of the subjacent principle to the legislated norm in which it is integrated. Generally, a binding statement will not survive if the legislated norm that it refers to is changed (or if a diverse norm is created in case of a previous absence), so that the statement and the new text are incompatible. However, even if the norm is changed or a new

⁵¹⁰ See Leite (2007, pp. 63-68), Tavares (2007, pp. 175-179) and See Schäfer (2012, pp. 127-128).

⁵¹¹ See Leite (2007, pp. 63-68) and Tavares (2007, pp. 175-179).

⁵¹² See Leite (2007, p. 34) and Tavares (2007, p. 146).

⁵¹³ See Vigliar (2005. p. 292).

norm is created, the statement can survive if the change does not affect the subjacent principle according to which the statement was created.⁵¹⁴

This possibility of reviewing or cancelling a binding statement (incompatible with the legislative norms) is extremely relevant so it can be conformed to the actual needs of the law and society, which are always in continuous transformation. Otherwise, it is possible, for instance, to face the abnormal situation of having, at the same time, a binding statement which was not revised or cancelled, and so it is binding for constitutional commands, and a statute with incompatible provisions with the statement.

Although there is no mention in article 5º of Law 11417/2006, the minimum quorum to revise or cancel the binding statement, following the same rule of article 103-A and article 2º, § 3º, of Law 11417/2006, shall be two thirds of the members of the court.⁵¹⁵ And similar to that which occurs with the issuing of a binding statement, it will also demand a thorough discussion on the matter.

(viii) The Binding Effect and the “Reclamação Constitucional”

The possibility of filing a “*Reclamação Constitucional*” (a “Constitutional Complaint” or “Constitutional Claim”) before the Federal Supreme Court, arguing the violation of a binding statement by a lower court or the public Administration, is the most palpable practical effect of the new Binding *Súmula*.⁵¹⁶

Historically, the *Reclamação* is product of the Federal Supreme Court’s case law. It is commonly said that its creation was based on the idea of the implied powers granted by the Constitution to the Supreme Court. The Supreme Court utilised the doctrine of implied powers for the solution of the operational problem of enforcement of its decisions: as the Courts had the power to adjudicate, it also had the power to create mechanisms to assure the authority of its decisions. In 1957, however, it was incorporated into the Supreme Court’s Internal Regulation.

⁵¹⁴ See Vigliar (2005, p. 292) and Leite (2007, p. 169).

⁵¹⁵ See Wolkart, Erik Navarro. *Súmula vinculante: necessidade e implicações práticas de sua adoção* (o processo civil em movimento). In Wambier, Teresa Arruda Alvim (coord). *Direito jurisprudencial* (São Paulo, RT, 2012), p. 295.

⁵¹⁶ Concerning the relation between Binding *Súmula* and *Reclamação*, see Schäfer (2012, pp. 158-168).

Furthermore, the Brazilian Constitution of 1967, which authorised the Supreme Court to establish the procedural rules of lawsuits under its jurisdiction, recognised force of federal law to the Internal Regulation of the Court. The *Reclamação*, from that point on, at least indirectly, was also based on a constitutional provision.

Finally, the Federal Constitution of 1988, article 102, I, “I”, expressly granted full constitutional status to the *Reclamação*. According to Constitution of 1988 (article 102, I, “I”), the purposes of the Constitutional Complaint are both to preserve the jurisdiction and to ensure the authority of the decisions of the Federal Supreme Court before other courts and the public Administration.^{517,518}

Specifically, according to the new § 3º of article 103-A of the Federal Constitution (regulated by article 7º of Law 11417/2006), any administrative act or judicial decision, which goes against an applicable binding statement or applies it in an undue manner, may be contested before the Supreme Court. This means that the Administration and all other judicial bodies, when dealing with a legal question already incorporated to the Supreme Court’s Binding *Súmula*, must correctly apply the legal understanding that is in the respective binding statement. The bound organ must always verify the adequacy of the facts of the case into its hands to the binding statement. Analysing the concrete case, it will verify if it should or should not apply the binding statement of the Federal Supreme Court to it.⁵¹⁹ This inevitably implies a certain degree of interpretation. The problem of interpreting the statement deserves specific attention: the same interpretation commonly given by the Federal Supreme Court must be sought, because if the bound body reaches an interpretation that is wrong or distorted, the binding statement will remain disobeyed.

If a judicial decision or administrative act disobey, deny or misapply binding statement, the damaged party can file a specific constitutional-procedural mechanism, the *Reclamação*, to present a request to the Federal Supreme Court (besides the applicable appeals or remedies before other judicial courts), so that the

⁵¹⁷ The Constitution of 1988, article 105, I, “f”, also stated that that it would be permitted to file a *Reclamação* claims before the Superior Court of Justice (Federal Constitution, article 105, I, “f”) equally destined to safeguard the jurisdiction of the Court and to guarantee the authority of its decisions.

⁵¹⁸ The proceedings of the “Constitutional complaint”, which are basically the same of the Brazilian “*Mandado de Segurança*”, are very simple. Within the Federal Supreme Court, the basic rules are in the Court’s Internal Statute, articles 156 to 162 and in Law 8038/1990, articles 13 to 18.

⁵¹⁹ Concerning the possibility of distinguishing between the matter of the case in trial and the binding statement, see Marinoni (2010b, pp. 353-369).

Court can immediately guarantee the authority of its consolidated case-law (Law 11417/2006, article 7º).⁵²⁰ The Supreme Court shall nullify the administrative act or the judicial decision and determine their substitution with or without the application of the statement, as the case may require.⁵²¹ Sometimes, it is also required of the disobedient authority to act appropriately and, depending on the specific case, the Supreme Court may use all necessary means to reach this purpose.^{522,523}

(xix) The non-binding statements of the Federal Supreme Court

Constitutional Amendment 45/2004 was also concerned with the Supreme Court non-binding statements. As was seen, since 1963, the Federal Supreme Court has issued this statements aiming at guiding itself and other courts about its dominant understanding on certain matters. Up to now, 736 precedents were issued.⁵²⁴

According to its article 8º, a non-binding statement of the Federal Supreme Court will only have binding effect after its ratification by two thirds of the members of Court and the publication of this decision in the official press.

This provision immediately reveals two important things. Firstly, the existing difference between the classical *Súmula* and the new universally Binding *Súmula*. Secondly, it shows that old and persuasive statements of the Federal Supreme Court have, with the constitutional reform, not become automatically binding.^{525,526}

⁵²⁰ See Leite (2007, p. 80) and Tavares (2007, pp. 189-191).

⁵²¹ See Tavares (2007, pp. 181-183 and 186-190).

⁵²² See Morato, Leonardo Lins. *Reclamação e a sua finalidade para impor o respeito à súmula vinculante*. In Wambier, Teresa Arruda Alvim et al. (coords). *Reforma do Judiciário: primeiros ensaios críticos sobre a EC n. 45/2004* (São Paulo, RT, 2005), p. 399-400.

⁵²³ See also Leite (2007, pp. 79 and 86).

⁵²⁴ On the Brazilian Federal Supreme Court website, to verify its non-binding *Súmula*, go to: <http://www.stf.jus.br/portal/cms/verTexto.asp?servico=jurisprudenciaSumula>. Accessed 7 August 2012.

⁵²⁵ See *Reclamação* – Rcl-MC 10707/DF – Monocratic decision – *Rapporteur* Justice Celso de Mello – j. 20-10-2010 – Dje 4-11-2010; *Reclamação* – Rcl-AgR 3979/DF – STF – Full Bench – *Rapporteur* Justice Gilmar Mendes – j. 3-5-2006 – DJ 2-6-2006 PP-00005 – EMENT VOL-02235-01 PP-00107 - LEXSTF v. 28, n. 332, 2006, p. 262-266; and *Reclamação* – Rcl-AgR 3284/SP – STF – Full Bench – *Rapporteur* Justice Ayres Britto – j. 1-7-2009 – DJe-162 DIVULG 27-8-2009 PUBLIC 28-8-2009 – EMENT VOL-02371-01 PP-00204.

⁵²⁶ Criticising this article and defending the immediate bindingness of the old *Súmula*, Vigliar (2005, p. 290) says that it is meaningless to require the Supreme Court to hold several sessions to analyse and repeat its positions that had been previously stated in its old, but valid, *Súmula*.

Furthermore, there is no doubt that the same requirements demanded for the new binding statements must be demanded of the old statements, in case they are analysed and ratified by two thirds of the members of the Court, in order to have the binding effect after publication in the official press.⁵²⁷

5.4 Characteristic Features of the Brazilian Binding *Súmula*: Distinction with the English Model of Precedents

There is no doubt that the Federal Supreme Court's Binding *Súmula* represents a rupture with the dogmatic tradition that has existed in Brazil and other countries that abide by Roman-Germanic tradition around legislated standards.⁵²⁸

However, it is necessary to be clear that a *súmula* (or a statement of it) signifies something different to the English binding precedent in the theory of *stare decisis*.⁵²⁹ Observing the Brazilian model of *súmula* and comparing it to the English binding precedent, it can be seen, immediately, that its origin is different and that the content of a *súmula*'s statement is much less extensive than the English precedent. The differences are not related to the persuasive or binding character of the *súmula*. Even if a *súmula* is universally binding (as it is the case of the new Federal Supreme Court's Binding *Súmula* according to the reformed constitutional text), there are still several differences which must be highlighted.

Firstly, in the English binding precedent model, the general binding force is the fruit of an isolated decision, while a statement of a *súmula* is a result of or, more precisely, a compendium of a series of judgments that only gives a clear secure understanding of what was already dominant in the Court.⁵³⁰

Secondly, the Brazilian *súmula* is similar to an index or compendium that presents brief statements about the Supreme Court case law. This means that, currently, from a simple internet search, this solid case law can be identified rapidly on a number of legal themes.

Thirdly, the binding precedent is an answer, in the form of a judicial decision, to a concrete case, that has a *ratio decidendi* and *obiter dicta* (without mentioning

⁵²⁷ See Tavares (2007, pp. 143-144).

⁵²⁸ See Leite (2007, p. 21).

⁵²⁹ See Tavares (2007, pp. 131-132).

⁵³⁰ See Marinoni (2010b, pp. 216-217).

the question of the facts of the case), aspects that need to be duly distinguished to verify what is truly important or not. On the other hand, each statement of a *súmula*, in its formality, is a true extract of essentially legal content⁵³¹, consolidating the interpretation of the question of law as established by previous decisions⁵³² in the same sense. A binding statement, as seen previously, should be short, direct and clear. It does not have (or are not to have) affirmations *a latere* (known, in the theory of *stare decisis*, as *obiter dicta*) and all of its content is considered essential.

Furthermore, there is a characteristic which has special contours in a legal system, such as the Brazilian system, related to the civil law tradition: the validity of the statements of a *súmula* is always conditioned by the support it has on the legislated norm.⁵³³ It is true that we have several types of statements: a) merely declaratory, which basically repeats the text of law; b) *intra legem*, which, once there is a legal provision for the theme, interprets it properly within the limits already established in the legal system; c) *extra legem*, which fills in the blanks left by the Legislation or extends the limits established by it, without harming the vector principles of the system.⁵³⁴ However, all of them were linked with legislated norms or norms that should have been legislated (in this case, precisely because the norms were not legislated there is the statement), merely “repeating” their texts, truly interpreting them, occupying the spaces left by them or expanding the limits previously established by them (legal norms).

In fact, the statement of a *súmula*, according to Alvim, in essence, has the stability of the principle subjacent from statute for which it was made; so, if it has the stability of the principle embedded in the statute, and, even if the statute is changed (which has previously occurred) since the same principle is strictly maintained, this does not imply changes in the statement, which continues to exist and must be applied.⁵³⁵ In other words, a binding statement should not survive if the text of the legislated norm it relates is altered (or a legislated norm is created in case of

⁵³¹ See Wolkart (2012, p. 296).

⁵³² Consulting the Supreme Court Binding *Súmula* it is possible to see the previous decisions that were taken into consideration for the issuing of each statement.

⁵³³ See Leite (2007, pp. 71-74) and Schäfer (2012, p. 106).

⁵³⁴ Streck (1998, p. 167) presents a different classification: redundant, *intra legem*, *extra legem*, *contra legem* and unconstitutional *súmulas*. It is quite interesting and was very useful here, because, part of its nomenclature was used, although with a different meaning.

⁵³⁵ Alvim, Arruda. *Tratado de direito processual civil*, vol 2 (2nd ed, São Paulo, RT, 1990), p. 15.

previous absence), so that the statement and the new text of the legislative norm become incompatible. For instance, it was what happened to Statement 228 (approved in 16 December 1963) of the classical *Súmula* of the Federal Supreme Court, which stated that “it is not provisory the execution of a decision even pending an extraordinary appeal or other appeal to make it (the extraordinary appeal) admitted”. With respect to the civil procedure, this statement was overcome by the issue of the 1973 Civil Procedural Code, especially because of the new ruling of articles 542, §2º, and 587 of this statute, which state to be temporary the execution of a decision those decisions. However, even if the text of a legislated norm is altered or a new norm is created where one does not exist, the statement may survive if the modification does not affect the subjacent principle in relation with that statement was created. As an example, Statement 279 (also approved in 16 December 1963) of the classical *Súmula* the Federal Supreme Court, which states that “the extraordinary appeal aiming the mere re-examination of evidence should not be admitted”, despite the later constitutional and legal modifications of the extraordinary appeal discipline, remains in full force, because these modifications did not altered the principle that the extraordinary appeal does not serve to re-examine evidences.

It is further important to note that the system of the *súmula*, in the classical model (known as non-binding) has always been the object of profuse praise. It is a compass in an extensive and exhaustive case law jungle, as Serpa Lopes, a famous Brazilian Scholar, once stated.^{536,537} Certainly this is one more motive (perhaps even the most important) for, in practice, the non-binding *Súmula* (more specifically its persuasive statements) has a tendency to be worth more than the legislated norm itself, in spite of it having, dogmatically speaking, a merely persuasive character.

5.5 The Binding *Súmula* Model: Debates and Perspectives

⁵³⁶ Lopes (1988, pp. 94-95).

⁵³⁷ Lebedev, quoted by Vereshchagin (2007, p. 104), presents the same understanding in Russia about the interpretative guidelines: “This idea is good, especially today courts are mad on it – complete independence, it’s very good. But the point is that today...in this situation when we have a scrappy legislation, the explanatory of a superior court...are simple necessary. It is judges who ask for it”.

Due to the introduction of the Binding *Súmula* into Brazilian law, the theme of precedents has become a main topic in the legal literature in Brazil. Frequently, the discussion among Brazilian scholars has been based upon the convenience of the adoption of the Binding *Súmula* and some form of prejudice has often influenced this debate.⁵³⁸

It is true, as Moreira affirms in an article about the future of justice, that the overestimation of foreign models is a myth which has to be faced carefully.⁵³⁹ With the simple adoption of the common law system of binding precedents, without the proper adaptations, Brazil would be endorsing a model that is opposite to the traditions and realities of the country. The adoption of a general rule of *stare decisis* would collide with the reality of a country of continental dimensions and regional differences and a Judicial Power that consists of judges often with very different values about the same legal or factual situation.

Undoubtedly, the Binding *Súmula* is not a case of simple adoption of a foreign model. As already said, the *Súmula* represents a rupture with the dogmatic tradition that has existed in Brazil and other countries that abide by civil tradition, around legislated standards.⁵⁴⁰ Nevertheless, the *Súmula* model has a history of achievements in Brazil, in the classic non-binding model, since the 1960s. Based on this history, the creation of the Supreme Court Binding *Súmula* presents a strong compatibility with the Brazilian legal traditions.

In any case, the first direct criticism against a model such as the new Binding *Súmula* is connected to the theory of the separation of powers. It is argued that the Judiciary power, issuing a *Súmula* with a binding effect, with *erga omnes* efficacy, seems to be exercising those functions which are appropriate to a Legislative power.⁵⁴¹

As seen in Chapter 2, it is possible to counter this argument by arguing that the theory of separation of powers is not so strict to the point of totally precluding the exercise, by one of the State's powers, of a function usually attributed to another

⁵³⁸ As already seen in Chapter 2.

⁵³⁹ Moreira, José Carlos Barbosa. O futuro da Justiça: alguns mitos. *Revista de Processo*, n. 99, jul/set 2000a, p. 146.

⁵⁴⁰ See Schäfer (2012, p. 108).

⁵⁴¹ See Sormani, Alexandre and Santander, Nelson Luis. *Súmula Vinculante* (2nd ed, Curitiba, Juruá, 2008), p. 87.

power.⁵⁴² In contemporary constitutionalism, the examples of exercise by one of the State's powers of another power's typical function are well known (for instance, in Brazil, the judicial review of legislation).⁵⁴³ This new constitutionalism abandons the idea of a rigid *separation des pouvoirs* and confirms the idea of a sharing of powers.⁵⁴⁴ Besides, in Brazil, after the Constitution of 1988, judges frequently deal with cases that involve groups of people or even the whole society. This overcomes the idea that attributes the making of general rules to the Parliament and confines the judge to the scope of concrete and individual cases.⁵⁴⁵ Finally, based on this neo-constitutionalist interpretation of the Constitution of 1988, the Brazilian Judiciary, as also mentioned in Chapter 2, should give effect to the constitutional norms that protect values such as equality and speed in judicial decisions, adopting mechanisms that improve the Judiciary's performance. One of the mechanisms, in spite of the doctrine of the *separation des pouvoirs*, is the Supreme Court's Binding *Súmula*.⁵⁴⁶

The second objection linked to the adoption of a model such as the Binding *Súmula*, and probably the most common, is that this would change the judge's decision into a simple mechanism of applying the existent precedent. Judges would lose their free conviction to interpret the law and would be completely prevented from departing from the binding statement, even though they considered it wrong.⁵⁴⁷

Although any model of binding precedent means, in summary, that judges and lower courts must follow higher courts' precedents (and often their own precedents), in practice the judicial decisions, in systems informed by the doctrine of binding precedent, are neither neutral nor mechanical. The rule is to follow the precedent (and that is the utility of the doctrine) but often, for several pertinent reasons, judges or courts do not follow this apparently binding precedent.⁵⁴⁸ These same reasons, to

⁵⁴² See Cunha (1990, p. 447).

⁵⁴³ See Tavares (2007, pp. 108-114 and 119).

⁵⁴⁴ See Cappelletti (1990, p. 111-112).

⁵⁴⁵ See Dinamarco (2002, p. 1.135).

⁵⁴⁶ See Marinoni (2010b, pp. 204-205).

⁵⁴⁷ For a similar debate in Russia, where the "question is whether the power of highest courts to issue binding explanations is contrary to the constitutional principle of judicial independence", see Vereshchagin (2007, p. 104-107).

⁵⁴⁸ See Elliott and Quinn (2011, p. 12).

a proper degree and with proper adaptations, can be applied to the Brazilian Binding *Súmula*.

It is important to remember that the Binding *Súmula* is not intended to impose ties on judges and courts.⁵⁴⁹ As seen previously, what is proposed is a formula for preventing the litigants' fortune from depending on the frequent changes in the composition of the courts and the changes in the understanding that comes from as a result of this, depending on the mere distribution of the case to a certain judicial body or, even worse, depending on the stubbornness of the judge appointed to the case.

Besides, even after the Supreme Court confirms some interpretation in its *Súmula*, nothing prevents the judges or courts, although it is not very practical, from adopting a contrary position to the Supreme Court. Against this independence, there are no disciplinary sanctions.^{550,551} As previously noted, the consequence of this independence is only to allow a "*Reclamação*" before the Supreme Court, requiring this Court to restore the authority of the Binding *Súmula*.

This "religious" defence of the judicial independence suffers also from a lack of pragmatism, because it disregards all the advantages of a model such as the Binding *Súmula*. It is unreal and, above all, contrary to the public interest, because, apparently, the Binding *Súmula* can be a solution, in the short term, to minimise some problems of a historical dilatory and unstable system of justice.⁵⁵²

Furthermore, as previously mentioned, the principle of "rational persuasion of the judge" or "freedom to interpret the law", although very important, must be reconciled with the constitutional principle of equality of all people before the law (declared in the *caput* of article 5º of the Brazilian Constitution).⁵⁵³ Every time diverging judicial decisions are applied to similar cases, the constitutional principle of

⁵⁴⁹ See Leite (2007, pp. 107-108), Silva (2005, p. 117) and Tavares (2007, p. 119).

⁵⁵⁰ See excerpt of the opinion of Justice Nery da Silveira *Ação Declaratória de Constitucionalidade – ADC-MC 4/DF – STF – Full Bench – Rapporteur Justice Sydney Sanches – j. 11-2-1998 – DJ 21-5-1999 – EMENT 1951-1 – RTJ 169 pp. 432-433*, quoted at p. XX.

⁵⁵¹ For the same situation in Russia, see Vereshchagin (2007, p. 103): in former Soviet law "there were no formal sanctions which would require lower judges to comply with Supreme Court guidelines. Nor are such sanctions provided by Russian legislation".

⁵⁵² See Tucci (2004, p. 281).

⁵⁵³ Precisely supporting the same point of view, Vereshchagin (2007, p. 107) states that, in Russia, "the binding force of Supreme Court explanations can be reconciled with the principle of independence of judges".

equality of all before the law is undermined. In other words, the constitutional principle of equality will be an empty formula unless both principles are reconciled. This conciliation presupposes the non-destruction of one of them.

To conclude this chapter, it will be useful to consider the following points:

Firstly, one has to bear in mind that in Brazil a reduction in litigation can be achieved with the development of the Federal Supreme Court's Binding *Súmula*, because there are thousands and thousands of cases that come to courts dealing with identical or similar law thesis. The Supreme Court itself, from the 1990s, began to complain about the workload which was impeding the optimum running of its office and, at the beginning of this century, a crisis arose in the Court when the number of cases reached insupportable figures. However, since 2007 (the year of the issuing of the first binding statement), lower courts have had to follow the binding statements of the Supreme Court, and the situation has improved. To give a comprehensive panorama from recent years, 127,535 cases arrived at the Supreme Court in 2006. Although others measures, as the "*repercussão geral*" (which was seen in Chapter 4), have also contributed for the improvement of the figures, not coincidentally, in 2007, the year of the first binding statement, there were 119,304 (in 2008 – 100,895, in 2009 – 82,221, in 2010 – 74,708), and in 2011 – 63,427.⁵⁵⁴ Consequently, the number of cases in trial before de Federal Supreme Court has also been decreasing. In 2006, they were 150,001 (in 2007 – 129,623, in 2008 – 112,080, in 2009 – 100,634 and in 2010 – 90,295); in 2011, 67.395.⁵⁵⁵ Currently, with thirty one binding statements⁵⁵⁶ published by the Supreme Court, there is also an unquestionable pragmatic value supporting the Binding *Súmula*, which has contributed to a greater fluency in the resolution of cases and a reduction in the backlog of trials.

However, the efficacy of a mechanism such as the Supreme Court Binding *Súmula* will also depend on how it will be culturally accepted by the Administration and the other judicial courts. The voluntary compliance of its statements is fundamental. Otherwise, there will be numerous claims that will make the application of the binding effect, as a consequence, almost impractical.⁵⁵⁷

⁵⁵⁴ See Supremo Tribunal Federal (2011, p. 40).

⁵⁵⁵ See Supremo Tribunal Federal (2011, pp. 38-39).

⁵⁵⁶ See appendix with the list of all statements of the Federal Supreme Court Binding *Súmula*.

⁵⁵⁷ See Ramos, Saulo. Questões do efeito vinculante. *Cadernos de Direito Constitucional e Ciência Política - Revista dos Tribunais*, v. 4, n. 16, jul/set 1996, p. 34.

In Brazil, one good example of voluntary compliance that can be cited comes from the Superior Labour Court that adapted its proper non-binding *Súmula*, precisely its Statement 228⁵⁵⁸, producing a new text to follow the new Supreme Court's Binding Statement 4. Indeed, the old Superior Labour Court's Statement 228 said that the value of the additional pay for hazard conditions should consider the minimum wage referred to by article 76 of the Consolidation of the Labour Laws, except in the cases referred in its Statement 17. However, in 2008, the Federal Supreme Court issued the Binding Statement 4⁵⁵⁹ saying that, except in the cases provided in the Federal Constitution, the minimum wage cannot be used as an indexer to calculate any salary advantages of civil servants and private employees. In a decision of 26 June 2008, the Superior Labour Court decided to change the word of its statement 228, affirming that, from 9 May 2008 (the date of the publication of the Federal Supreme Court's Binding Statement 4), the additional pay for hazard conditions should be calculated considering the real basic salary of the employees.⁵⁶⁰

Secondly, although a model such as the Binding *Súmula* will bring benefits, it is not correct to think that it will be a miracle cure for all the problems of any judicial system. Indeed, in the near future, in Brazil, it will be necessary to think in parallel measures which work together with the Binding *Súmula* in order for the legal system to be more effective, and these include: (i) explicitly establishing the compulsory application of a fine in case of abuse of the right of defence, with delaying purpose, in order to defy binding statements; (ii) establishing the compulsory application of fines to appeals which defy, with the purpose of delaying, binding statements; (iii) adopting some type of recommendation for granting an injunction order when the case is based upon a binding statement and there is abuse of the right of defence or a delaying purpose is manifested.^{561,562}

⁵⁵⁸ Statement TST 228 – Redação original Res. 14/1985 DJ 19-9-1985 – Segunda redação Res. 121/2003 DJ 19-11-2003 – Terceira redação Res. 148/2008 DJ 4-7-2008.

⁵⁵⁹ Decision of 30-4-2008 – DJe 5-9-2008 p. 1 – DJ 9-5-2008 p. 1.

⁵⁶⁰ Nevertheless, the enforcement of this new text is currently suspended due to a preventive measure granted by the Federal Supreme Court in *Reclamação* – Rcl-MC 6266/DF – STF – *Rapporteur* Justice Cármen Lúcia – j. 15-7-2008 – DJe 8-4-2008.

⁵⁶¹ Also supporting the adoption of parallel measures, see Oliveira, Pedro Miranda de. A (in)efetividade da súmula vinculante: a necessidade de medidas paralelas. In Wambier, Teresa Arruda Alvim et al. (coords). *Reforma do Judiciário: primeiros ensaios críticos sobre a EC n. 45/2004* (São Paulo, RT, 2005), pp. 591-605.

One should also be careful with enthusiastic opinions that state only the Binding *Súmula* can solve the problems of an undesirable dilatory and unstable system of justice such as the Brazilian one. Prudently, it is better to say that the model of *Súmula* has been effective in Brazil, and that it is also possible, based on it but in a wider perspective, to debate some ideas for a better use of binding precedents, which also reflects the experiences of both civil and common law traditions.

⁵⁶² Certainly, there already are general rules regulating and punishing the abuse of process in Brazil. Here are proposed new rules and measures specifically directed to the enforcement of the Binding *Súmula*.

	Common Law (English) Binding Precedent	Classical <i>Súmula</i>	Binding <i>Súmula</i>
Historical Origin	Progressive Customary Recognition	Judicial creation in the 1960s and legislative absorption in the 1970s	Constitutional Reform
Issued by	Basically all Courts	All Brazilian collegiate courts	The Federal Supreme Court
Form of	A Judicial Decision	Numbered Short and Direct Statements	Numbered Short and Direct Statements
Result of	A Single Judicial Decision	Several Decisions in the Same Sense	Several Decisions in the Same Sense
Content	<i>Ratio Decidendi</i> , <i>Obiter Dicta</i> and Facts	No <i>Obiter Dicta</i> and No Facts	No <i>Obiter Dicta</i> and No Facts
Binding to	All Courts (Except for the Supreme Court of the United Kingdom)	Externally Persuasive and Internally Binding	All Court (Except for the Brazilian Federal Supreme Court)
Relation with the Legislation	Autonomous	Validity Conditioned by the Support in the Legislation	Validity Conditioned by the Support in the Legislation
Branches of Law	All	All	Constitutional Law (Generally Mixed with Other Branches of Law)
Accessibility	By Law Reports	By an Index for Simple Internet Search	By an Index for Simple Internet Search

6 Conclusions: Towards an Efficient Model of Precedents

6.1 General Considerations

Any rule of binding precedents implies advantages and disadvantages, and the doctrine of *stare decisis*, even in common law countries, has always had its supporters and detractors. However, apart from the fact that some of the potential problems of the doctrine are more apparent than real, a legal system that adopts any rule of binding precedents must find a way to make the advantages, which are in greater number, satisfactorily overcome the disadvantages.

This final chapter focuses on some of the advantages of the doctrine of *stare decisis*: stability, certainty of law, equality and time-saving, as positive criteria of functionality, in order to analyse some of the improvements in the deliverance of justice in Brazil since the adoption of a more comprehensive approach to binding precedents. The analysis will be illustrated with data from Brazilian official databases and reports. This methodology is believed to be balanced to avoid the overuse of either pure conceptual elements or strict empirical knowledge.

Taking the English model as a paradigm, this chapter also compares and debates some of the strengths of the new Brazilian approach to precedents. Revisiting and developing some of the ideas previously addressed, this chapter will highlight the question of the greater simplicity of the new Brazilian model of Binding *Súmula* when compared with the common law doctrine of *stare decisis*. It will also focus on the good access to precedents in the Brazilian legal system. Finally, it will examine the balance between statutes and precedents as established by the model of Binding *Súmula*, emphasising that the Brazilian mix of civil and common law elements has proved a very synergic model.

Based on this comparative analysis of the improvements in the deliverance of justice in Brazil, this chapter aims to pose some questions that could not be fully addressed without first giving, as this thesis did, a complete account of how precedents are understood and how they operate in Brazil: What role should precedents have in a country that abides by a Western (that is, civil or common law) legal tradition? How to find a better regulation for a model of precedents in order to

attain good standards of functionality? In the near future, should an official binding *súmula* be introduced in the United Kingdom Supreme Court to overcome the challenge of distinguishing *ratio decidendi* and *obiter dicta* in its case law? Would a model of *súmula* harmonise with the tradition and particularities of the English law? What is the nature of the relationship between precedents and legislation in a legal system, such as that of Brazil, which has traditionally emphasised the statute law? Has Brazil reached a good balance between legislation and precedents? How in a civil law system can the judicial law-making be legitimated?

6.2 Disadvantages of the Application of the Rule of *Stare Decisis*

Martin asserts that, concerning the doctrine of *stare decisis*, every “*advantage has a corresponding disadvantage*”.⁵⁶³ Although this statement sounds exaggerated, the doctrine has some potential disadvantages that cannot be concealed. The legal literature in Brazil points out some of these disadvantages: the rigidity and the slowness of growth of the binding case law, the complexity of the common law doctrine of *stare decisis* and the supposed offences to the principles of the rational persuasion of the judge and the separation of powers.^{564,565} However, as already partially seen in Chapters 2 and 5, some of these disadvantages or problems are more apparent than real.

For instance, in Brazil it is said that the adoption of the Binding *Súmula* can give an undesirable rigidity to the Brazilian legal system. It is pointed out that the tendency is, after the Constitutional Reform in 2004 (with the “barriers” of the Binding *Súmula* and the requirement of general repercussion in extraordinary appeals), that progressively fewer cases reach the Federal Supreme Court. It is argued that the new rules would unhealthily immobilise the “natural” evolution of Brazilian case law. Undoubtedly, under social conditions in change or in areas of law in which the legislation has been updated, attributing a sacred value to precedents would sometimes be an exaggerated formalism and not reasonable.⁵⁶⁶

⁵⁶³ Martin (1999, p. 32).

⁵⁶⁴ This list of disadvantages or potential problems is not exhaustive.

⁵⁶⁵ Analysing some of these potential problems in Brazil, see: Marinoni (2010b, pp. 190-212) and Souza (2006, pp. 283-296).

⁵⁶⁶ See Ross, Alf. *Direito e Justiça* (Edson Bini tr, Bauru, Edipro, 2000), p. 111.

However, this problem is certainly more apparent than real. As seen previously, any (common law) legal system that adopts a rule of *stare decisis* also has some space for flexibility (which is wider in the USA than it is in England). Among other things, there is the power to distinguish, which, once it is correctly used, gives the courts the freedom to depart from previous decisions; besides this, even though it is an exception, there is the possibility of overruling, which serves, by revoking the undesirable precedent, to develop the law.

In Brazil, the existence of the Binding *Súmula* will not forbid judges or courts from adopting a contrary position to the Federal Supreme Court. Once there is a binding statement which should be followed, what the judge must not do is to depart from it arbitrarily. Indeed, it is possible to depart from the binding precedent with the application of reasonable and sufficient grounds. Against this independence, there are no disciplinary sanctions.⁵⁶⁷ The only practical consequence of this is to allow a *Reclamação* before the Federal Supreme Court to restore the authority of the Binding *Súmula*. Consequently, the existence of the rule of binding precedent will not eternally prevent the courts from adopting a different point of view and initializing a new line of case law.

A further observation to be made is that a legal system based upon statutes and codes can also be very static. Actually, it tends to be even more static because the changes in case law are much more usual - at least, normally, they should be - than the changes in legislation. In Brazil, as Rosas and Aragão recognise⁵⁶⁸, the case law has frequently anticipated the legislation in the solution of legal questions. A statute is supposedly created to last forever. However, the society is not static, but dynamic. It changes constantly following the progress. Although Brazilian judges are not expected to substitute the Parliament, they are called to interpret the legislation and adapt them to a new reality. Besides, it is impossible to imagine the legislation covering all the legal issues, and Brazilian judges are also frequently called to supplement the legislation. In this sense, the role of the case law in the development of the Brazilian law is undeniable.

It is also argued that the common law doctrine of *stare decisis* is complex.

⁵⁶⁷ See excerpt of the opinion of Justice Nery da Silveira in *Ação Declaratória de Constitucionalidade – ADC-MC 4/DF – STF – Full Bench – Rapporteur Justice Sydney Sanches – j. 11-2-1998 – DJ 21-5-1999 – EMENT 1951-1 – RTJ 169 pp. 432-433*, quoted at p. XX.

⁵⁶⁸ Rosas and Aragão (1998, p. 69).

This is in part true. Firstly, the complexity of any rule of *stare decisis* comes from the circumstance of the existence, in any country, of millions and millions of decided cases. It is not easy to find all relevant case law even with an online database. Secondly, the doctrine itself, as it was built, is complex. Many times, in a given precedent, there is no precise distinction between mere *obiter* and the *ratio decidendi* of the case. However, in the specific case of Brazil, with the simple adoption of the Binding *Súmula*, such problems, in principle, do not exist.⁵⁶⁹ On the contrary, through the Binding *Súmula*, the firm case law of the Federal Supreme Court, concerning several legal themes, can be identified fast. It is only necessary to browse the Supreme Court webpage. Besides, the statements of Binding *Súmula*, each of them compiling and consolidating (the fundamentals of) several previous decisions in the same sense concerning an issue of law, do not have affirmations *a latere* (the reported *obiter dicta*), and all of their contents are considered essential.

Against the rule of *stare decisis* (especially against the possibility of judicial law-making), some Brazilian scholars also mention the doctrine of the separation of powers, encapsulated in the Federal Constitution, which recommends that the legislative, judicial and executive functions of the State should be exercised by separate bodies. The possibility of the courts to make law would represent a clear breach of this doctrine.⁵⁷⁰

As seen in Chapters 2 and 5, the doctrine is not so strict to the point of totally forbidding the exercise, by one of the State's powers, of a function usually attributed to another power. Currently Brazil has seen the development of a new understanding of the principle of separation of powers. This new constitutionalism abandons the idea of a rigid *separation des pouvoirs* and confirms the idea of a sharing of powers.⁵⁷¹ In the contemporaneous Brazilian constitutionalism, procedures based on a system of checks and balances are widely known, such as the judicial review of legislation. Besides, above all after the advent of the Constitution of 1988, judges in Brazil do not only manipulate individual cases, but also those which, for the massive

⁵⁶⁹ Of course the system may be complex due to other factors. The Brazilian appeal system, which needs to be improved and simplified, is an important factor for the complexity of our judicial system as a whole.

⁵⁷⁰ This question of the limits of judicial power is not exclusive to Brazil. In all legal systems with a civil law background, such as France for instance, there has been a similar defiance to the expansion of judicial law making. See Steiner (2010, mainly pp. 85 and 87).

⁵⁷¹ See Cappelletti (1990, p. 111-112).

impact they can have, involve a considerable part of the community. This also overcomes the idea that attributes the abstract and generic treatment of law to the Parliament and confines the judge to concrete and individual cases.⁵⁷² Finally, based on this neo-constitutionalist interpretation of the Federal Constitution of 1988, the Brazilian Judiciary, as previously mentioned in Chapter 2, should give effect to the substantive constitutional norms, which protect values such as equality and speed in judicial decisions. The Brazilian law, taking into consideration all these values, is obliged to adopt mechanisms that improve the performance of the Judiciary as a whole. One of the measures to be taken, in spite of the doctrine of the *separation des pouvoirs*, is the adoption of an effective system of creative and binding precedents.⁵⁷³

One final objection raised against the adoption of any doctrine of binding precedent in Brazil – and more specifically to the new *Súmula Vinculante* of the Federal Supreme Court’s decisions – is that this would change the judge’s decision into a simple mechanism of applying the precedent to the case on trial.⁵⁷⁴ The judge would lose the free conviction to decide and would be completely prevented from departing from a precedent, although he considered it wrong.

As seen previously, this is not true. In practice, the judicial decisions, in legal systems informed by a doctrine of binding precedent, are neither neutral nor mechanical. The rule is to follow the precedent, but, often, for several pertinent reasons, a court may depart from an (apparently) binding precedent.⁵⁷⁵ The establishment of a more comprehensive approach to binding precedents in Brazil (in the case, for instance, of the Supreme Court’s Binding *Súmula*) does not forbid courts and judges to adjudicate the law in a new way when the binding understanding shows signs that is outdated. In truth, nothing prevents judges or lower courts, although it is not very practical, from adopting a contrary position to the Supreme Court. As already seen (mainly in Chapters 4 and 5), the consequence of this is simply to allow a “*Reclamação*” to the Supreme Court in order provoke it to restore the authority of its own binding decision.⁵⁷⁶ Secondly, it can be said that the

⁵⁷² See Dinamarco (2002, p. 1.135).

⁵⁷³ See Marinoni (2010b, pp. 204-205).

⁵⁷⁴ Criticising this objection, see Marinoni (2010b, pp. 205-210).

⁵⁷⁵ See Elliott and Quinn (2011, p. 12).

⁵⁷⁶ See again the excerpt of the opinion of Justice Nery da Silveira in *Ação Declaratória de*

principle of the judge's rational persuasion or freedom to interpret law, although it is very important, must be reconciled with the constitutional principle of equality of all before the law, which is also encapsulated in the Brazilian Constitution of 1988. Every time divergent judicial decisions are applied to similar cases, the constitutional principle of equality of all before the law is seriously attacked.⁵⁷⁷ Finally, this resistant view in favour of a mythological free persuasion of the judge has an inconceivable lack of pragmatism, because it potentially wastes all the advantages of the doctrine of *stare decisis*.

6.3 The New Uses of Precedents and the Improvement of the Brazilian Legal System

Apart from the fact that some of the disadvantages (or potential problems) of the doctrine of *stare decisis*, as previously mentioned, are more apparent than real, in any case, a legal system that adopts a rule of this kind must find a way to make the advantages or virtues, which are greater in number, satisfactorily overcome the disadvantages.

These virtues attributed to the doctrine of *stare decisis* vary according to the consulted source^{578,579}. However, the justification commonly given to the doctrine may be summarised by four words: stability, certainty, equality and time-saving.⁵⁸⁰

(i) Stability

It is said that a rule of *stare decisis* generates stability to the legal system. Binding precedents aim to be valid truths for every equal or similar case. It implies

Constitucionalidade – ADC-MC 4/DF – STF – Full Bench – *Rapporteur* Justice Sydney Sanches – j. 11-2-1998 – DJ 21-5-1999 – EMENT 1951-1 – RTJ 169 pp. 432-433, quoted at p. XX.

⁵⁷⁷ See Tassara (1989, p. 83-84).

⁵⁷⁸ In Brazil, supporting the adoption of a comprehensive rule of binding precedents, Marinoni (2010b, pp. 121-190), for instance, list several arguments. According to him, a rule of binding precedents, among other things, produces stability, legal certainty, confidence, equality, the coherence of the legal system and the impartiality of the judge; it discourages litigation and stimulates agreements; it produces a greater acceptance of the decisions, rationalises the appeal system and increases the effectiveness of the Judicial Power.

⁵⁷⁹ In Brazil, see also Souza (2006, pp. 296-308).

⁵⁸⁰ See Ataíde Júnior (2012, p. 136).

the progressive consolidation of well-grounded opinions, which are repeatedly considered as right.

Unfortunately, the instability of the law seems to be part of Brazilian legal history. It is enough to remember that, different from the United States of America, which has maintained its first constitution, Brazil, through its short existence as an independent country (about 200 years), has had several constitutions.

The Brazilian case law has also suffered from a lack of stability. The historical absence of a doctrine of *stare decisis* suggests that judges are free to depart from what they simply consider incorrect.⁵⁸¹ For instance, as seen in Chapter 3, judges can recognise that, concerning the matter of the case on trial, there is a precedent. Nevertheless, they can disregard the precedent by recognising changes in the circumstances which caused that previous decision and simply pronounce a decision in another sense. This inconsistent application of the law has certainly harmed the judicial system's reliability. It would be better to have a wrong but stable than an uncertain case law, it can be said.

However, those involved in the administration of justice in Brazil started to realise that the departures from or the overruling of precedents should not be an easy task as it has traditionally been. They realised that the departure from and the overruling of a precedent, based on its inconvenience, inaccuracy or even injustice, always implies a damage to the stability (as well as to the predictability and equality) of the legal system.⁵⁸² Accordingly, several categories of binding precedents, as seen mainly in Chapters 4 and 5, were created to assure more adherence to previous decisions.⁵⁸³

One old example of these binding precedents, presented in Chapter 4, is the incident concerning the standardisation of the case law within the same court,

⁵⁸¹ See Souza (2006, p. 290).

⁵⁸² See Souza (2006, p. 150).

⁵⁸³ Commonly, Legislators concern themselves only with questions of morality and politics when they change the law. They do not need to show that they are coherent in relation with their peers in the Legislative or in past legislatures. Legislators – in legal systems in which the Constitution guarantees the “*égalité*” before the law – should justify only those changes which imply a simultaneous different treatment between citizens. Judges in a system of binding precedents only very rarely show this type of independence. They should try to associate the justification provided by them with the decisions that other judges had taken in the past. Differently from Legislators, judges, to preserve a minimum of stability and certainty in the law, should always justify when they change the criterion. See Marinoni, Luis Guilherme. O precedente na dimensão da igualdade. In Marinoni, Luiz Guilherme (coord). *A força dos precedentes: estudos dos cursos de mestrado e doutorado em direito processual civil da UFPR* (Salvador, JusPODIVM, 2010), p. 233.

regulated by the Brazilian Code of Civil Procedure (articles 476 to 479). Its name reveals the concern of the Code in maintaining the unity of the law within the same court.⁵⁸⁴ As seen in Chapter 4, in this incident, the full bench (or the pertinent standardisation organ) interpretation concerning a given legal issue must be observed by the panel in the decision of the concrete case (article 478) and constitutes, to the court, a binding precedent for further cases (article 479).⁵⁸⁵ More recently, Law 10259/2002 (article 14, *caput*), which regulates the civil proceedings in the Federal Small Claims Courts, established an incident for standardisation of interpretation of federal law when there are divergent interpretations on matters of substantive law in decisions pronounced by appellate panels. The objective of this incident is the same as the incident of the Code of Civil Procedure. The decision of the incident of standardisation in the Federal Small Claims Courts should be observed by the appellate panel in the decision of the respective concrete case. The precedent will also bind the decisions of new cases dealing with the same question of substantive law.

Most important, stability is one of the clear advantages of the new Supreme Federal Court's Binding *Súmula* model. Besides the fact that it encapsulates a legal thesis that is supposed to be a valid truth for every similar or equal case, the Court will only exceptionally revise or cancel a statement of its Binding *Súmula*. Each statement of the Federal Supreme Court Binding *Súmula*, as a result of reiterated decisions in the same sense, is supposed to reflect the wisdom of the Supreme Court as an institution transcending the moment. When the Supreme Court, based upon principles established in several previous cases, decides to incorporate a new statement in its Binding *Súmula*, it is certainly preserving a rare and precious knowledge that, in many decisions, was carefully constructed and improved. Indeed, according to article 5º of Law 11417/2006, the Court, by its own initiative or by external proposition⁵⁸⁶, should revise or cancel a statement if it becomes incompatible with the legislative norms (including the Constitution). However, the minimum quorum to revise or cancel the binding statement, as seen in Chapter 5, shall be two thirds of the members of the Court, also demanding, similar to what

⁵⁸⁴ See also Wambier (2001, p. 331).

⁵⁸⁵ See Rocha (1977, p. 78).

⁵⁸⁶ See Leite (2007, p. 34) and Tavares (2007, p. 146).

occurs with the issuing of a statement, a thorough discussion on the matter. Otherwise, the statement will be constantly remembered and special measures have been established to prevent it from being forgotten (mainly the “*Reclamação Constitucional*”).

(ii) Certainty of Law

The interest in stability does not exhaust the goals that the *stare decisis* doctrine serves.⁵⁸⁷ The certainty of law is related to stability. It is said that the consistent succession of precedents contributes to make the solution of future litigations predictable.⁵⁸⁸ In Brazil, Alvim makes a good connection between stability and certainty. According to him, it is not “acceptable that the same legal question has more than one understanding [above all in the same historical moment]. The attribute of certainty is an irrefutable need of any legal system. The double interpretation would create, certainly, dubiety about the conduct”.⁵⁸⁹

The knowledge of the existence of firm precedents makes certain which will be the solution applied to the case if the same legal question is brought to the courts. Individuals can organise their conduct and businesses appropriately. Lawyers can advise their clients beforehand, because there already is a prediction of how the legal issues would be solved judicially. Before a stable case law, everyone knows what can rely on; whereas, before an uncertain case law, no one is sure of what is right or wrong.

Since in the Brazilian legal system most precedents are not formally binding, they can simply not be followed. The allowance of courts and judges to freely depart from or overrule what they consider incorrect is considered a weak point in the legal system in terms of certainty of law.

One of the motives for the creation of the Federal Supreme Court’s Binding *Súmula*, for instance, was that it provides a greater degree of certainty about the law. It must be remembered that among the requirements to issue a binding statement is

⁵⁸⁷ See Ehrlich, Eugen. *Fundamentos da sociologia do direito*. In Morris, Clarence (org). *Os grandes filósofos do direito* (São Paulo, Martins Fontes, 2002), p. 459.

⁵⁸⁸ Farnsworth, E. Allan. *Introdução ao Sistema Jurídico dos Estados Unidos* (Antônio Carlos Diniz de Andrada tr, Rio de Janeiro, Forense, [196-]), p. 62.

⁵⁸⁹ Alvim (1995, p. 303).

the existence of a current controversy among judicial organs or between them and public Administration, which can cause severe judicial insecurity. The Binding *Súmula* is a response to this judicial insecurity. It is the summary of a series of judgements that gives a clear and secure understanding of what is dominant in the Supreme Court. Individually, each statement of the *Súmula* recovers a determined aspect of the legislation (or fills an empty space left by it), with an interpretation that is considered to be consolidated, and contributes, point by point, to the certainty of the law. In practice, the *Súmula* is nothing more than an index, composed of several brief statements, that presents the Supreme Court's solid case law on several legal issues. Through the *Súmula*, by a simple Internet search, this case law can be identified. This helpful and user-friendly tool makes a great contribution to predictability for the resolution of present and future litigations.

The same can be said about the issue of the multiplicity of special appeals based upon a similar question of law (regulated by Law 11.672/08, which altered the Code of Civil Procedure) and the requirement of general repercussion in extraordinary appeals, already addressed in Chapter 4. The Superior Court of Justice, on its website, keeps track of the special appeals that have been considered as paradigms for other special appeals based upon a similar question of law. The Federal Regional Courts, the State Courts of Justice or any lawyer can easily see their progress and what has been decided in them. Concerning the requirement of general repercussion in extraordinary appeals, as seen in Chapter 4, once the decision concerning this requirement is proffered, the Chief Justice's Office shall promote specific and broad publicity of the content of the decision and shall update the database regarding the issue.⁵⁹⁰ The website of the Federal Supreme Court already provides an extensive list of issues for which the general repercussion has already been recognised as well as a list of issues in which it has not happened.⁵⁹¹ As Marinoni states, this clearly "contributes to the certainty of law".⁵⁹²

Finally, the issue of prospective decisions is also of special relevance for the stability and certainty of law in Brazil. Under Brazilian law, in the case of the judicial review of legislation, the retroactivity of the decisions that declare a law

⁵⁹⁰ See the Internal Statute of Federal Supreme Court, article 329.

⁵⁹¹ Until (and including) 2011, 509 issues of general repercussion had been accessed by the Supreme Court. According to the Federal Supreme Court – Report 2011 (p. 49),

⁵⁹² See Marinoni (2010b, p. 475).

unconstitutional has traditionally been the rule. As seen previously, theoretically this fits better with the Brazilian understanding of unconstitutional laws.⁵⁹³ However, as everyone is expected to act in accordance with the laws, which are presumably constitutional, there is a need to maintain confidence in the relations established under the aegis of them. Indeed, despite some criticism⁵⁹⁴, giving prospective effects to decisions of unconstitutionality has sometimes appeared to be the most convenient solution. Based on reasons of legal certainty or exceptional social interest (article 27 of Law 9868/99), the Supreme Court has often refused to retrospectively change the law (notwithstanding the fact that it has expressed its disapproval over the normative act) and has pronounced that some of its understandings are to be followed just for future facts or acts to be performed after the respective decisions. In other cases, when announcing the rule, the Supreme Court has simultaneously indicated a precise date from which its decision should be applied, and the (unconstitutional) normative act will continue to be applied for a certain period of time fixed by the Supreme Court itself.

The way the Supreme Courts acts in these cases clearly contributes to the certainty of law. The possibility of limiting the impact of the decision, in order to not reach situations prior to the decision itself, for instance, clearly enforces the certainty of law within the Brazilian legal system, because the decisions of unconstitutionality will not supposedly affect people who relied on the (un)constitutional norm. Besides, if it is the case of one of its decision to be applied prospectively, the Supreme Court, as a rule, does not leave the question of time effectiveness to be decided by the court where the same point of law can be discussed in the future. This also contributes to the certainty of law (and to the equality) because the possibility of different points of view about the time effectiveness of the Supreme Court's decision could also affect the predictability of the application of its understandings.

(iii) Equality

It is also defended that the application of the same rule in successive similar

⁵⁹³ As seen in Chapters 3 and 4, the Justice Marshall's doctrine in *Marbury v. Madison* – stating that the unconstitutional law is null, void and of no effect – has been widely accepted in Brazilian law since the beginning of the Republican period.

⁵⁹⁴ This criticism was mentioned in Chapter 3. See also Souza (2006, pp. 160-163).

cases results in the equal treatment of all who present themselves to justice.⁵⁹⁵ The principle of equality of all before the law is one of the strongest arguments in favour of the use of precedents to similar cases. Proclaimed in direct legal terms by article VII of the Universal Declaration of Human Rights, it has been acclaimed as a political and legal dogma in the constitutions of the great majority of Western countries. It is also present in the 1988 Brazilian Constitution, in article 5^o, *caput*, as the first of the individual fundamental rights. However, the principle of equality before the law cannot remain only in the normative plan. It should also have a place in the solution of concrete cases by courts. Giving different decisions to equal or similar cases would not only seem to be against the law, but also arbitrary to the common man, who cannot conceive of two opposite decisions solving the same situation.⁵⁹⁶ As Dworkin defends, the force of a precedent can be explained through an appeal, not to implement promulgated laws, but to treat similar cases in the same way.⁵⁹⁷

As seen previously, the allowance of judges to freely depart from a precedent they consider incorrect is considered a weak point in the Brazilian legal system. The practice even demonstrates that judges and appellate courts see themselves as authorised to disregard the precedents of the Superior Court of Justice (the court responsible for the harmonisation of the federal law) and Federal Supreme Court, sometimes without even giving reasons for this.⁵⁹⁸ The fact that in many cases precedents are simply not followed has historically generated a significant amount of contradictory decisions (of courts of the same or different hierarchy and even within the same court) and some previous attempts to solve this problem have not proven sufficiently effective.

The coexistence of both centralised and decentralised models of judicial review of legislation in Brazil aggravates the problem concerning the consistency of the very important constitutional case law. As previously mentioned, Brazil has adopted the decentralised model of control but without incorporating the American (common law) rule of binding precedents. The absence of this rule repeatedly

⁵⁹⁵ See Farnsworth ([196-], p. 62).

⁵⁹⁶ Rosas and Aragão (1998, pp. 27-28).

⁵⁹⁷ See Dworkin, Ronald. *Levando os direitos a sério* (Nelson Boeira tr, São Paulo, Martins Fontes, 2002), pp. 175-177.

⁵⁹⁸ Concerning this issue, see excerpt of the opinion of Justice Francisco Rezek in *Ação Declaratória de Constitucionalidade – ADC-QO 1/DF – STF – Full Bench – Rapporteur Justice Moreira Alves – j. 27-10-1993 – DJ 16-6-1995 – LEX/JSTF*, n. 214, pp. 52-53, quoted in Chapter 2.

generates conflicting decisions, with the same normative act being considered as constitutional by some judges and courts and unconstitutional by others. The problem can be much more serious if this contradiction is related, as sometimes occurs, to the decisions of the Federal Supreme Court (in both decentralised and centralised reviews), the organ expressly responsible for safeguarding the Constitution. Having mechanisms to harmonise the decentralised and centralised models, enforcing the role of the Supreme Court in both cases, is of great importance to reduce the problem of the absence of uniformity in issues related to constitutional law to an acceptable degree.

One of the desiderata of the Binding *Súmula*, which gives binding effects to the Supreme Court's consolidated case law in context of the decentralised judicial review of legislation, for instance, is to make uniform the Brazilian constitutional case law. It must be remembered that among the requirements to issue a binding statement is the existence of a current controversy among judicial organs or between them and the public Administration about the validity, interpretation or efficacy of specific norms. With its several statements, the Binding *Súmula* healthily mitigates the variation of understandings on several questions of the law and provides consolidated case law upon which the judges will base their decisions. It avoids arbitrariness in judicial decisions in spite of the ideology or personality of the judges and contributes to the application of the same rule for similar cases. This reinforcement of the role of the Federal Supreme Court as the highest national court clearly strengthens the principle of equality of all before the law.

To conclude this topic, some words on the question of the development of law are necessary. Certainly, in Brazil or in England, stability, certainty and equality must always be balanced with the question of the development of law. It would certainly be wrong to think that, based on the doctrine of *stare decisis* or any other argument of justice, similar cases will be necessarily decided in the same way forever. The arguments of stability, certainty and equality cannot be taken as absolute. Previous decisions should not be constantly regretted and the case law changed, but some changes are possible (or even imperative), based on specific arguments that

challenge the *ratio decidendi* (fundamentals) of a precedent and show that a different decision would be fairer, more convenient or even necessary.⁵⁹⁹

(iv) *Time-saving*

Finally, it is said that the use of an established criterion for the solution of new cases saves time and energy.⁶⁰⁰ A leitmotif in the history of the judicial process is its duration. The time required for the delivery of the final decision was always seen as something that brings appreciable harm to the parties, especially to the one who, in the face of the dispute, is not with the goods or property in dispute “in hands”.⁶⁰¹ In Brazil, although the situation has improved recently, historically the long delays in getting the final decisions have led to staunch criticism from lawyers and citizens. Everyone has demanded that courts hand out justice more quickly, recognising that these delays not only undermine the Judiciary but also destroy the people’s confidence in the legal system as a whole.

One of the greatest problems related to the issue of the judicial process’s duration in Brazil is the amount of cases that Brazilian courts should manage with a limited budget and limited human resources. This amount is enormous. Considering the three most important branches of the Brazilian Judiciary (the State Courts, the

⁵⁹⁹ In England, for instance, in *Davis v Johnson* [1978] 2 WLR 553, the House of Lords (composed, in that occasion, of Lords Diplock, Dilhorne, Kilbrandon, Salmon and Scarman) debated the questions of stability and certainty, as qualities of the theory of *stare decisis*, concerning the question of the development of law. The Court considered these themes both in the ambit of a supreme court or a court of last resort (in that case, the House of Lords itself) and in the ambit of an intermediate court (specifically, the Court of Appeal – Civil Division). Lord Diplock firstly stated: “In an appellate court of last resort a balance must be struck between the need on the one side for the legal certainty resulting from the binding effect of previous decisions and, on the other side, the avoidance of undue restriction on the proper development of the law. In the case of an intermediate appellate court, however, the second desideratum can be taken care of by appeal to a superior appellate court, if reasonable means of access to it are available; while the risk to the first desideratum, legal certainty, if the court is not bound by its own previous decisions grows ever greater. So the balance does not lie in the same place as in the case of a court of last resort”. Later, in the same decision, Lord Diplock concluded, reproducing Lord Scarman’s words in *Tiverton Estates Ltd v Wearwell Ltd* [1975] Ch 172, that: “The Court of Appeal occupies a central but, save for a few exceptions, an intermediate position in our legal system. To a large extent, the consistency and certainty of the law depend upon it. It sits almost always in divisions of three: more judges can sit to hear a case, but their decision enjoys no greater authority than a court composed of three. If, therefore, throwing aside the restraints of *Young v Bristol Aeroplane Co Ltd*, one division of the court should refuse to follow another because it believed the other’s decision to be wrong, there would be a risk of confusion and doubt arising where there should be consistency and certainty. The appropriate forum for the correction of the Court of Appeal’s errors is the House of Lords”.

⁶⁰⁰ Farnsworth ([196-], p. 62).

⁶⁰¹ See Marinoni (2010b, p. 186).

Federal Courts and the Labour Courts), around 83.4 million lawsuits were processed in 2010 (more than 70% were filed before this year, that is, were already pending in early 2010).⁶⁰² Fortunately, this number represents a decrease if compared with the 86.6 million in 2009.⁶⁰³⁶⁰⁴

The caseload – that is, the amount of lawsuits each magistrate has to rule on, on average, every year – is a cause for great concern. According to *Justice in Numbers 2010* (a report prepared by the Brazilian National Council of Justice), on average in 2010, each judge of 1st instance of the Brazilian Judicial Power had 5,423 lawsuits that could be ruled on.⁶⁰⁵ In the 2nd instance (appellate courts), each judge had, in the same year, on average 2,819 lawsuits to rule on. In the case of the 2nd instance, the indicator varies considerably from 1,877 lawsuits in the Labour Courts up to 11,896 lawsuits in the Federal Courts (the highest caseload indicator in the 2nd instance of the Brazilian Judicial Power).⁶⁰⁶

Another problem is the backlog rate – that is, the indicator used to measure, in a given year, the percentage of lawsuits being processed which have not been closed – that is also extremely high. According to *Justice in Numbers 2010*, the 1st instance courts of the Brazilian Judiciary had, in 2010, a backlog rate of 58% for pre-trial lawsuits, that is, out of 100 lawsuits being processed in the system in that year, approximately 58 were not finally referred (or were not referred to the execution stage). The highest percentages were found in State and Federal Courts (60% and 58%, respectively)⁶⁰⁷. The backlog rate for execution stage lawsuits is even higher. The 1st instance courts of the Brazilian Judiciary had, in 2010, a backlog rate of 84% for execution stage lawsuits (that is, out of 100 lawsuits being processed, approximately 84 were not closed). The highest percentage values were again found

⁶⁰² See Conselho Nacional de Justiça - CNJ. *Justice in Numbers 2010 - Indicators of the Judiciary Power - Overview of the Brazilian Judiciary Power - Executive Summary* (Brasília, Conselho Nacional de Justiça – CNJ, 2011), p. 6.

⁶⁰³ See Conselho Nacional de Justiça - CNJ. *Justice in Numbers 2009 - Indicators of the Judiciary Power - Overview of the Brazilian Judiciary Power - Executive Summary* (Brasília, Conselho Nacional de Justiça – CNJ, 2010), p. 15.

⁶⁰⁴ *Justice in Numbers* is a report, prepared by the Brazilian National Council of Justice annually, concerning the figures of the Brazilian Judicial Power.

⁶⁰⁵ See Conselho Nacional de Justiça - CNJ (2011, p. 8).

⁶⁰⁶ See Conselho Nacional de Justiça - CNJ (2011, p. 11).

⁶⁰⁷ See Conselho Nacional de Justiça - CNJ (2011, p. 9).

in the State and Federal Courts (86% and 85%, respectively).^{608,609,610} In the 2nd instance, on average, the backlog rate for lawsuits was 50% in 2010. The numbers differ when considering the branch of Judicial Power: 48% in State Courts of Justice, 68% in Federal Regional Courts and 28% in Labour Regional Courts.⁶¹¹ In 2010, the general backlog rate of the Brazilian Judiciary, considering both courts of 1st and 2nd instances, was 70%. The higher backlog rate, of 72%, was found in state courts; the lower, of only 49%, in labour courts.⁶¹²

Taking into consideration this unfortunate background, there has been an increasing demand for Brazilian courts to hand out justice more quickly. It is considered a fundamental goal to be pursued with the adoption of measures to prevent procrastinated situations and mechanisms to save time in the solution of cases.

The doctrine of *stare decisis*, for the practicality that exists in the reproduction of criteria, formulas or principles previously worked, is a great mechanism for reaching this objective.⁶¹³ A rule of *stare decisis* admittedly avoids responsibilities and difficulties and saves time for the judge.⁶¹⁴ As precedents represent not only the experience of the judges, but also their different talents and expertise, they enable

⁶⁰⁸ See Conselho Nacional de Justiça - CNJ (2011, p. 9).

⁶⁰⁹ The problem here is also a consequence of the historical small percentage of lawsuits finalised in less than one year in 1st instance courts. On average, considering all branches of the Brazilian Judiciary, out of 100 lawsuits initiated, only 29 were finalized within a period of one year. See Conselho Nacional de Justiça – CNJ (2011, p. 14).

⁶¹⁰ It is important to differentiate backlog rates for pre-trial and execution stage lawsuits. The backlog rate in execution stage lawsuits is far superior to that of the rate for pre-trial lawsuits. According to Justice in Numbers 2010, “out of the 83.4 million ongoing lawsuits in Brazilian courts in 2010, 27 million were fiscal enforcement lawsuits, constituting approximately 32% of the total. It is noteworthy that 88% of these fiscal enforcement lawsuits (i.e. 23.7 million) were being processed only at State Courts, which contributed to create a bottleneck in that branch of justice. It is important to mention that out of 48 million lawsuits pending resolution in State Courts, approximately 20.9 million (equivalent to 43.5%) were fiscal enforcement proceedings. When looking only at lawsuits which are currently at the enforcement stage, when considering the three branches of Justice together the number of fiscal enforcement lawsuits becomes even more prominent, since they represent 76% of the total number of lawsuits in this stage of the proceeding. It should be noted that in Federal Courts the percentage of fiscal enforcement lawsuits reached 79% of the ongoing lawsuits in the 2010 fiscal year”. See Conselho Nacional de Justiça – CNJ (2011, p. 16). From the data collected, one of the conclusions is that the struggle against delays in the Brazilian Judicial System should also focus on the issue of inefficacy of tax enforcement procedures. See Conselho Nacional de Justiça – CNJ (2011, p. 16).

⁶¹¹ See Conselho Nacional de Justiça – CNJ (2011, p. 11).

⁶¹² See Conselho Nacional de Justiça – CNJ (2011, p. 14).

⁶¹³ See Sotelo (1998, p. 338-339).

⁶¹⁴ See Ross (2000, p. 111).

judges to draw on the knowledge of its peers. Based upon this economical and healthy way of thought, the expenditure of intellectual work that is always involved in the search for the correct decision often can be avoided by giving the decision accordingly to a principle which has already been found.⁶¹⁵ If the same issue has already been decided many times before, the judge, instead of reconsidering it, can apply the precedents (which is usually a much simpler task) and use his/her time and capability to study and decide other issues, sometimes more relevant, for which there are no firm precedents.

To fulfil this idea of a swifter justice, some binding precedents are very important to the specialised branches of the Brazilian Judiciary. The normative power of the Brazilian Electoral Courts was referred to in Chapter 4. Normative resolutions delivered by the Superior Electoral Court bind all Regional Electoral Courts and electoral judges; if given by a Regional Electoral Court, they bind the court itself and the electoral courts of its own jurisdiction. These resolutions are invariably followed based on the certainty of the futility of opposing an understanding of a superior or regional court, during the time of electoral proceeding (expedited by nature). Taking into consideration the Brazilian experience, these resolutions have an indisputable history of success. They democratically predict electoral law and contribute enormously to reduce the quantity of disputes and accelerate adjudications, among other things.⁶¹⁶ The same can be said concerning the Labour Courts and the “normative sentence” (referred in articles 5º, XXI and 114 of the Federal Constitution and regulated in articles 868 to 871 of the Consolidation of Labour Laws). Through a normative sentence, an appellate Labour Court or the Superior Labour Court (at national level), in case of collective disputes, may establish new labour conditions and extend these conditions to all employees of the company in the same profession, even those that do not participate in the bargaining. The extension may still be larger, covering all employees of the same professional category within the jurisdiction of the court, provided it fulfils the requirements of articles 869 and 870⁶¹⁷ of the Consolidation of Labour Laws. The normative sentence binds the inferior courts, which must appreciate further individual

⁶¹⁵ See Ehrlich (2002, p. 459).

⁶¹⁶ See Jardim (1998, p. 1982).

⁶¹⁷ See Sampaio (1985b, p. 10).

actions in accordance with the provisions of the normative sentence. Its success was recognised by the Federal Constitution of 1998 that referred to it as an instrument to assure labour as well as fundamental rights.

Currently, after the Constitutional Amendment 45/2004, the Federal Constitution, article 5º, LXXVIII, defines as a fundamental right the reasonable length of proceedings and the means to guarantee this to everyone, both in the judicial and administrative spheres. Considering both the points of view of the consumer of the judicial services and of the Judiciary itself, there will be no due access to justice if a final judicial decision is given lately.⁶¹⁸

Not coincidentally, after the Constitutional Amendment 45/2004 and the implementation of some measures, such as the adoption of several categories of binding precedents, most of the indicators concerning the functionality of the Brazilian Judicial Power have improved significantly.

First of all, according to Justice in Number 2010, considering the State, Federal and Labour Courts, there was a decrease in the number of lawsuits processed by year if comparing 2010 and 2009: 83.4 million lawsuits were processed in 2010;⁶¹⁹ there were 86.6 million in 2009.⁶²⁰

Secondly, a reduction of 3.9% was verified when comparing the amount of new cases filed in 2010 and 2009. In Federal Courts the percentage of reduction was more significant: 6.1%. In State Courts and Labour Courts, the percentages of reduction were 3.5% and 3.9%, respectively. These specific figures also suggest an improvement in terms of stability and certainty in the Brazilian law as a whole.

Thirdly, comparing 2010 with 2009, there was a decrease of 6.6% in the amount of new lawsuits per judge.⁶²¹ This confirms the positive figures verified by comparing 2009 and 2008, when there was a decrease of 12.75% in the amount of new lawsuits per judge.⁶²² This double decrease has inverted a historical trend, observed in the period 2004-08, which had indicated an average growth of around 2% per year. This could signify a definitive turning point in the increase of new cases in Brazil, possibly leading towards the stabilisation of the figures.

⁶¹⁸ See Dinamarco (2002, p. 37).

⁶¹⁹ See Conselho Nacional de Justiça – CNJ (2011, p. 6).

⁶²⁰ See Conselho Nacional de Justiça – CNJ (2010, p. 15).

⁶²¹ See Conselho Nacional de Justiça – CNJ (2011, p. 13).

⁶²² See Conselho Nacional de Justiça – CNJ (2010, p. 15).

Fourthly, the indicator of lawsuits referred per new lawsuit in the 1st instance in 2010 was positive, at 104%⁶²³, numerically demonstrating that more lawsuits were referred to the next stage than were filed in the year, with positive effects in the backlog rate. In 2010, State, Federal and Labour 1st instance courts obtained a positive balance as regards the indicator of lawsuits referred per new lawsuit: 111%, 106% and 104%, respectively.⁶²⁴ Concerning the 2nd instance, with respect to the indicator of lawsuits referred per new lawsuit, Federal Regional Courts and Labour Regional Courts achieved positive percentages: 100% and 104%, respectively. State Appellate Courts had more trouble handling its stock of lawsuits, achieving a percentage of around 92%.⁶²⁵ With the general indicator of 104%, Justice in Numbers 2010 shows that the Brazilian Judicial Power achieved the goal of referring more lawsuits than those filed in the same year.⁶²⁶

Fifthly, concerning the backlog rates, the figures also improved from 2009 to 2010. According to the Justice in Numbers 2010⁶²⁷, the 1st instance courts of the Brazilian Judiciary had, in 2010, a backlog rate of 58% for pre-trial lawsuits; in 2009, according to the Justice in Numbers 2009⁶²⁸, it was 59.6%. In 2010, for execution stage lawsuits in 1st instance courts, the backlog rate was 84%; in 2009, 86.6%. In the 2nd instance, on average, the backlog rate for lawsuits was 50% in 2010; in 2009, 51.7%. In 2010, the general backlog rate of the Brazilian Judiciary was 70% compared with 71% of 2009. This decrease, although small, seems to break a trend that has been stable since 2004.

Justice in Numbers 2010 also contains data on the rate of electronic lawsuit filing, which shows the level of computer technology adherence of the Brazilian Judicial Power, a very important tool in terms of a future swifter justice. Considering the percentage of new electronic lawsuits in the total number of new lawsuits filed in one year, it has been possible to observe that Federal Courts have been working in a progressive way regarding the implementation of virtual lawsuits, with indices

⁶²³ See Conselho Nacional de Justiça – CNJ (2011, p. 15).

⁶²⁴ See Conselho Nacional de Justiça – CNJ (2011, p. 10).

⁶²⁵ See Conselho Nacional de Justiça – CNJ (2011, p. 12).

⁶²⁶ In 2009, Brazilian Judicial Power was close to achieving the goal of referring more lawsuits than those filed in the same year: 99%. See Conselho Nacional de Justiça – CNJ (2010, p. 16).

⁶²⁷ See Conselho Nacional de Justiça – CNJ (2011, p. 14).

⁶²⁸ See Conselho Nacional de Justiça – CNJ (2010, p. 16).

ranging from 43% in the courts of the 3rd Region to 82% in the courts of the 5th Region.^{629,630}

The new approach to binding precedents in Brazil has helped to improve the decision-making and is certainly contributing to this improvement of the figures of the Brazilian Judicial Power. The procedural mechanism created for the case of multiple special appeals based upon a similar question – a new category of binding precedent, since the Federal Regional Courts and the State Courts of Justice courts, in pending cases, are bound by the understanding established by the Superior Court of Justice – is a good example of this. This new proceeding for the special appeals, above all, works to relieve the Superior Court of Justice, the Federal Regional Courts and the State Courts of Justice from some of their traditional duties. Thus, these courts can focus on what they consider more important issues with more quality and speed.

Another good example is the requirement of general repercussion in extraordinary appeals. Under the new procedural-constitutional mechanism, the decision of the Federal Supreme Court, accessing the admissibility of extraordinary appeals in a paradigmatic situation, will bind the Court itself and all the inferior courts, when accessing the admissibility of extraordinary appeals in similar cases. If the general repercussion is not recognised, all extraordinary appeals regarding the same issue, both those that are in the Supreme Court and those that were halted by the inferior courts, will be promptly dismissed. As already seen, according to the Federal Supreme Court – Report 2011, until (and including) that year, 509 issues of general repercussion had been accessed by the Court. Among them, 251 had been definitively decided, either because the Supreme Court had not recognised the general repercussion in the given situation or because the Court had recognised and also decided the merits of the extraordinary appeal(s). On the other hand, in 258 cases the general repercussion had been recognised but these cases were waiting

⁶²⁹ See Conselho Nacional de Justiça – CNJ (2011, p. 15).

⁶³⁰ Comparing the figures of Justice in Numbers 2010 and 2009, maybe the only negative indicator concerns the number of terminating decisions pronounced on average per Brazilian judges in 2010. According to Justice in Numbers 2009, considering both 1st and 2nd instances, Brazilian judges had pronounced 1,439 terminating decisions on average in 2009. See Conselho Nacional de Justiça – CNJ (2010, pp. 16-17). On average, each magistrate ruled on 1,318 lawsuits in 2010, which represented a decrease of 7% in relation to 2009 data. See Conselho Nacional de Justiça – CNJ (2011, p. 15).

for the decision on the merits.⁶³¹ According to the Federal Supreme Court – Report 2011, only in 2011, the requirement of general repercussion was analysed in 146 cases. In 108 of them, the requirement was recognised, while in 38 it was not. Besides, 38 cases, which previously had had their general repercussions recognised, received decisions on the merits. This represents twice the figures of 2010 (19 cases). These positive figures of 2011 can be attributed to the Regimental Amendment 42 (of 2 December 2010). This Amendment introduced the new article 323-A into the Supreme Court's Internal Regulation and allowed that the merits of the cases with general repercussion could be decided by the “Virtual Full Bench” (or “Virtual Plenary”).⁶³² Indeed, out of the 38 decision on the merits in 2011, 17 were taken by the Virtual Full Bench.⁶³³

The idea behind the requirement of general repercussion is that only the really relevant questions will be finally decided by the Federal Supreme Court and not what is simple nonconformity of the losing parties (as important as their issues are for them), in order to improve, by decreasing the demand upon it, the Court's quality of adjudication. It has worked to drastically reduce the number of extraordinary appeals in the Court and has created promising prospects for the decentralised judicial review of legislation in Brazil, especially regarding the role of the Supreme Court as the Brazilian Constitutional Court.

Besides, concerning the requirement of general repercussion, the joint work of all Brazilian courts must be highlighted. In order to manage the issue of general repercussion properly, under the supervision of the Federal Supreme Court, all Brazilian courts have established a fruitful system of cooperation. The courts of origin have great responsibility for the success of the mechanism of general repercussion in extraordinary appeals. They are responsible for identifying the issues that will be forwarded and judged by the Supreme Court. They are also responsible for choosing the representative extraordinary appeals to be sent to the Supreme Court and halt the other appeals that have dealt with the same legal theme.

⁶³¹ See Supremo Tribunal Federal (2011, p. 49).

⁶³² A virtual judicial body, developed with the purpose of accelerating the judgments, where the court proceedings and decisions are done, with the support of electronic tools, without the physical presence of the Justices.

⁶³³ See Supremo Tribunal Federal (2011, p. 49).

According to the Federal Supreme Court – Report 2011, with the definitive decisions concerning the general repercussion in 2011, the Superior Court of Justice, the Superior Labour Court, the Federal Regional Courts of the 2nd, 3rd and 4th regions and at least eight State Courts of Justice were able to promptly decide about 70,000 cases concerning some relevant themes. This number was obtained through a survey in only thirteen courts and is probably much bigger. But this data, although incomplete, shows the impact of decisions proffered by the Supreme Court concerning the general repercussion of extraordinary appeals. To better illustrate this, the decision on merits in the General Repercussion Theme 4 (concerning the statute of limitations and the term *a quo* to file lawsuits to be repaid in case of tax unduly paid previously) enabled the Superior Court of Justice and the Federal Regional Court of the 4th Region to immediately judge more than 10,000 cases. The decision on merits of Theme 88 (concerning the formula to establish the value of pensions for retirement for health reasons) made possible the Federal Small Claim Courts to judge about 40,000 cases related to this matter.⁶³⁴

The Federal Supreme Court's Binding *Súmula* is another important tool to accelerate the adjudication of justice. Although there were other motives, the creation of Binding *Súmula* by Constitutional Amendment number 45/200 (regulated Law 11417/2006) aimed to reduce the delay in the adjudication of law in Brazil.⁶³⁵ There is no question about the usefulness of the Binding *Súmula* for this. One has to bear in mind that in Brazil a reduction in the number of controversies can be possible with the adoption of the model of Binding *Súmula*, because there are thousands and thousands of cases that come to courts that deal with identical or similar legal questions. They represent a great percentage in the number of cases in all Brazilian courts. Where an understanding concerning a legal question is firmly incorporated in the *Súmula*, cases that deal with the same question will unlikely go to courts or, at least, go through the lengthy (almost “eternal”) process of successive appeals in Brazil.⁶³⁶

As already mentioned in Chapters 4 and 5, the adoption of new constitutional-procedural mechanisms, such as the Binding *Súmula* and the requirement of general

⁶³⁴ See Supremo Tribunal Federal (2011, pp. 49-50).

⁶³⁵ One of the original goals in the creation of the Federal Supreme Court's Classical *Súmula* in the 1960s was to provide greater speed in jurisdictional decisions.

⁶³⁶ Concerning England, see Martin (1999, p. 33).

repercussion in extraordinary appeals, has already lead to an enormous reduction in the number of cases, dealing with identical or similar questions of law, before the Federal Supreme Court. Comparing the period of crisis in the 1990s and at the beginning of this century, when the number of cases before the Supreme Court reached insupportable figures, the situation now has clearly improved. As already seen, in 2006 127,535 cases arrived at the Supreme Court. In 2011, there were 63,427.⁶³⁷ As a consequence, the number of cases in trial before the Federal Supreme Court has also decreased. In 2006, there were 150,001, and in 2011 – 67.395.⁶³⁸ Comparing 2006 to 2011, it is possible to see a reduction of around 55% in the number of cases in trial before the Supreme Court. This healthy reduction in the number of procedures, for the first time in decades, has allowed the Federal Supreme Court to exercise its constitutional role more effectively.

(v) 2012 and beyond: perspectives in terms of time-saving

As seen previously, the Binding *Súmula* and the requirement of general repercussion in extraordinary appeals in over just a few years of effectiveness have already changed the profile of the judgments of the Federal Supreme Court. They have strengthened the role of the Supreme Court as the Brazilian Constitutional Court.⁶³⁹

The Federal Supreme Court really believes in the success of these two new Brazilian procedural mechanisms. The issues of Binding *Súmula* and general repercussion in extraordinary appeals have received the priority attention of the Court that changed its Internal Regulation and created two specific commissions (the Court's Commission of Case Law and the Court's Commission of General Repercussion) to specifically deal with them. The Court has also given all the administrative support for the development of both constitutional-procedural mechanisms.

Concerning the Binding *Súmula*, apart from the current thirty one binding statements, there are several proposals for new binding statements. Considering the

⁶³⁷ See Supremo Tribunal Federal (2011, p. 40).

⁶³⁸ See Supremo Tribunal Federal (2011, p. 38).

⁶³⁹ Linking the requirement of general repercussion in extraordinary appeals and the Binding *Súmula*, see Oliveira (2012, pp. 675-750).

date of 15 April 2012, a browse through the Federal Supreme Court's webpage shows that the figures have reached a total of 71 binding statement proposals (known as "PSV" or "*Proposta de Súmula Vinculante*"). This represents a very good prospect for the future.

With regards to the general repercussion in extraordinary appeals, according to the Supreme Court's former Chief Justice Cezar Peluso, it has already been identified that the Superior Court of Justice, the Superior Labour Court, the Federal Regional Courts of the 2nd, 3rd and 4th regions have around 190,000 extraordinary appeals concerning themes that are waiting the decision about their general repercussion. The decision of these themes is in the agenda for 2012.⁶⁴⁰ From the Federal Small Claim Courts of the 2nd, 3rd, 4th and 5th regions, it was also identified that about 150,000 cases are linked with only nine themes that are waiting the respective decisions concerning the general repercussion. To give an idea of this, themes 264, 265, 284 and 285 together represent 84,320 cases; Theme 313, 24,893 cases; Theme 163, 18,927 cases; Theme 96, 8,211 cases; Theme 351, 12,205 cases; and Theme 191, 6,186 cases. These themes are also in the agenda for 2012.⁶⁴¹

Besides, in order to focus on the cases of general repercussion that can have the greatest impact (in terms of quantity of related extraordinary appeals), for 2012 the Federal Supreme Court has initiated research before other Brazilian courts to gain a broader picture of the issue. It has already been noticed that some courts do not have the appropriate resources to manage their data. Meanwhile, the Supreme Court has started a partnership with the Department of Judiciary Research of the National Council of Justice, to better understand the reality of each court and the difficulties they face in collecting data and dealing with the respective backlogs. The goal is, articulated with the National Council of Justice, to help all courts to overcome the identified difficulties. It was also requested that the National Council of Justice conduct a new project of "Electronic Judicial Process" that should contemplate tools to specifically deal with the issue of general repercussion.⁶⁴²

⁶⁴⁰ See Supremo Tribunal Federal (2011, p. 12).

⁶⁴¹ See Supremo Tribunal Federal (2011, p. 50).

⁶⁴² See Supremo Tribunal Federal (2011, p. 50).

6.4 Strong Points of the Brazilian Model of Precedents

6.4.1 General Considerations

This chapter has sought to demonstrate that the increased use of precedents has helped to improve decision-making in Brazil. It is now time to emphasise that the Brazilian mix of civil and common law elements has proved a very synergic model, and that this cross-cultural Brazilian experience can play a role in developing the theory of precedents in both civil and common law legal worlds. After all, as Castellucci states:

Lawyers, scholars, courts working in 'classical' mixed jurisdictions, as well as the scholars devoted to the comparative study of those mixed systems have been to some extent – knowingly or not – an avant-garde of comparative law, and of Western law in general. They have at least played a role in developing a civil law/common law dual legal language for the western world. Most of all, they have been involved in dynamics now clearly identifiable in many or all legal systems belonging to the WLT: soon every western lawyer might have to learn to reason as 'classical' mixed jurists do.⁶⁴³

It should be said that this thesis does not intend to demonstrate that the Brazilian model of precedents is superior to the English model or vice-versa and, therefore, one of them should abandon its legal tradition through a radical transplant. However, reflecting on the purposes presented in the introductory chapter, this thesis can also be used as a tool for those dealing with law reform. As Steiner says, "law reform in common law jurisdictions increasingly concerns itself with examination of the legal method employed by Continental legal systems (...)"⁶⁴⁴

Revisiting and developing ideas already addressed in previous chapters, this topic will focus on three aspects of the Brazilian law: (i) the greater simplicity of the new Brazilian model of Binding *Súmula* if compared with the common law doctrine of *stare decisis*; (ii) the good access to precedents in Brazilian law; (iii) and the good balance between statutes and precedents as established by the model of Binding *Súmula*, emphasising the question of the legitimacy of the judicial law-making in Brazil.

⁶⁴³ See Castellucci (2008, p. 17).

⁶⁴⁴ See Steiner (2010, p. 5).

6.4.2 The Simplicity of the Model of Binding *Súmula*

This topic seeks to emphasise the greater simplicity of the new Brazilian model of Binding *Súmula* when compared with the common law doctrine of *stare decisis*. It is frequently said that common law doctrine of *stare decisis* is complex, and sometimes is a real challenge to find the suitable precedent for the case in trial. It is also said that one of the reasons for this is the notorious inconsistency of the concept of *ratio decidendi* in English Courts.⁶⁴⁵ Rather than what many people believe to be true, the only part of a precedent which is binding is the *ratio decidendi* or the reason for deciding.^{646,647} If a proposition that is part of the decision is not part of its *ratio decidendi*, it is *dictum* (or *obiter dictum*) and, consequently, not binding. Consequently, the first task that a common lawyer must do when analysing a precedent is to try to identify what propositions really constitute its *ratio decidendi*, distinguishing it from the mere *obiter dicta*. However, on many occasions, as Duxbury states, “the distinction between *ratio decidendi* and *obiter dicta*, although important, is not easily made”.⁶⁴⁸

Besides, a precedent is binding for the decision of identical cases because the individual norm it represents can be generalised. This generalisation – that is, the formulation of the general norm or principle – could be realised by the court that actually creates the precedent, but in England it is left to the courts that find themselves apparently bound by the precedent. It cannot be denied that different courts can generalise the decision that constitutes the precedent in different manners.⁶⁴⁹

⁶⁴⁵ The same happens in American courts.

⁶⁴⁶ See Cross and Harris (2004, p. 39)

⁶⁴⁷ See the Court of Appeal’s decision (in words of Lord May) in *Ashville Investments Ltd v Elmer Contractors Ltd* [1988] 3 WLR 867: “In my opinion the doctrine of precedent only involves this: that when a case has been decided in a court it is only the legal principle or principles on which that court has so decided that bind courts of concurrent or lower jurisdictions and require them to follow and adopt them when they are relevant to the decision in later cases before those courts. The *ratio decidendi* of a prior case, the reason why it was decided as it was, is in my view only to be understood in this somewhat limited sense”.

⁶⁴⁸ See Duxbury (2008, p. 68).

⁶⁴⁹ Since the decision that constitutes the precedent can only be binding on the decision of “equal” cases, the question of knowing whether a case is equal to the precedent is also of decisive importance. Since no case is “equal” to the precedent in every aspect, the “equality” of two cases can only reside in the fact that they coincide in certain essential points. However the question of knowing

In comparison, the new Brazilian Federal Supreme Court's Binding *Súmula* seems less intricate and, above all, the challenging task of differing *ratio decidendi* and *obiter dicta* does not seem to be a problem.

As seen in Chapter 5, the Binding *Súmula* refers to a set of case law that dominates the Supreme Court, including the various branches of law, organised by numbered annotations related to defined legal themes. Each statement of the Federal Supreme Court's Binding *Súmula* is a consolidation of several judgements that gives a clear and secure understanding of what is already dominant in the Court. Most importantly, while the binding precedent is an answer, in the form of a judicial decision, to a concrete case, that has a *ratio decidendi* and *obiter dicta* (and also the facts of the case), aspects that need to be duly distinguished to verify what is truly important or not, each statement of the Binding *Súmula*, as already seen, is a true extract of essentially legal content, consolidating the interpretation of the question of law as established by previous decisions in the same sense. As also mentioned previously, a single binding statement, encapsulating a given legal question, should be short, direct and clear. It does not have (or are not to have) affirmations *a latere* or *obiter dicta*, and all of its content should be considered essential.

Indeed, at first sight, the categories *ratio decidendi* and *obiter dicta* do not have to be duly distinguished, in a binding statement, to verify which is to be followed or not. Certainly, judges in Brazil must examine the statement with scrupulous care to ascertain whether and how they can legitimately apply what is expressed in it. They must achieve a coherent and just reasoning that can be appropriate to the case in trial. But everything that was stated should be evaluated and can be cited as the motivation or principle in the later court's decision. By not having to distinguish *ratio decidendi* and *obiter dicta*, Brazilian courts avoid difficult situations.

Should it be the case of adopting something similar in the English law? In the near future, should an official binding *Súmula* - with several statements, presenting a previous, clear and secure understanding of what is already consolidated in the court - be introduced in the United Kingdom Supreme Court to overcome the challenge of

which points need to coincide to be the cases considered as "equals" can only be answered based on the general rule that is created by the decision with character of precedent. Therefore only based on this general rule one can affirm whether two cases are alike. The formulation of this general rule is the necessary prerequisite for the decision of the precedent to be binding on the decision based on "equal" cases. See Kelsen, Hans. *Teoria pura do direito* (3rd ed, São Paulo, Martins Fontes, 1991), pp. 267-268.

distinguishing *ratio decidendi* and *obiter dicta* of its case law? Would this *súmula* be a good point of reference in the extensive and exhaustive case law research in England? Would the model of *súmula* harmonise with the tradition and particularities of the English law?

It should be reiterated that this thesis does not intend to affirm that the Brazilian model of Binding *Súmula* is superior to the long-established English model of precedents. This would be preposterous. However, these challenging questions can be posed, for future debate, concerning England or any other legal systems, independently of whether they are linked to the common law or civil law traditions. This thesis does not aim to answer this kind of challenging question. Nevertheless, achieving one of the fundamental goals referred to in the introductory chapter, the knowledge that it offers can certainly be used as a source for researchers or those interested in law reform, with regards to the issue of precedents, in England or elsewhere.

6.4.3 Access to Precedents

As seen in Chapter 3, in spite of the great amount of decisions pronounced in Brazil, a sophisticated official system of law reporting (reliable and easily accessible) is being progressively developed with the decisive participation of the Brazilian courts and government bodies.⁶⁵⁰ Brazilian courts have designated specialised personnel to revise their own decisions and report all the necessary aspects of them. Although oversights occasionally occur, courts have achieved a very good knowhow in reporting cases with the support of electronic and online tools that are currently generally reliable. Lawyers in Brazil often prefer to consult these official law reports, motivated by the fact that they are updated and their structure is very rational, not to mention that these law reports are online, which makes the search much easier.

The argument for official reports for all superior courts, both in Brazil and in England, is very powerful.^{651,652} Certainly, it is one of the ideas behind the “new”

⁶⁵⁰ As also seen in Chapter 3, similar to the USA (see Black, 1990, p. 887), law reporting in Brazil is done either officially by courts or by private publishers.

⁶⁵¹ As happens in the United States of America, according to Black (Ibid., p. 887).

⁶⁵² Concerning this issue, see Martin, Peter W. Neutral Citation, Court Web Sites, and Access to Authoritative Case Law (2007) 99 *Law Library Journal* – LLJ, p. 329.

system of neutral citation in England. Since 2001, the House of Lords (now the United Kingdom Supreme Court), the Privy Council, the Court of Appeal and the High Court of Justice (partially since 2002) have been issuing decisions with neutral citations⁶⁵³, which identify decisions independently of any traditional series of reports.

Although the neutral citation can be seen as a great step in the process of publicising the way of deliverance and citation of decisions in England, in general terms, as mentioned in Chapter 3, the English law reporting system continues to be a private enterprise. Because of an enormous quantity of cases in England and the evident problem of editorial discretion, sometimes it is extremely difficult to find the suitable precedent for cases in trial, even with the currently available technology.⁶⁵⁴ In the past, erroneous decisions were given because relevant cases were not brought to the attention of the court. It also occurs that the same case could be reported in more than one publisher, with some relevant discrepancies, which provokes a lack of authenticity in these reports.⁶⁵⁵ This diversity of law reports have lead the system into a state whereby courts have been oppressed with a weight of sometimes impertinent or inconsistent authority, with the result that it has produced a decrease in the efficiency and reliability of litigation in England.⁶⁵⁶

The Brazilian (official) free online access to precedents must also be highlighted.⁶⁵⁷ The amount of decided cases in Brazil is immeasurable and it is extremely difficult to research and find the suitable precedent from the printed forms of any law report. To supersede this difficulty, Brazilian Courts – including the Supreme Court, the superior courts, the federal courts and several state courts⁶⁵⁸ –

⁶⁵³ Decisions with neutral citations are freely available on the British and Irish Legal Information Institute website (www.bailii.org).

⁶⁵⁴ See Zander (2004, p. 319).

⁶⁵⁵ McLeod (2011, p. 102) explains this point by presenting two examples: “In *Export Credits Guarantee Department v. Universal Oil Products Co* [1983] 2 All ER 205, Lord Roskill described a case reported only in the *Solicitors’ Journal* as being ‘virtually unreported’. Even more pointedly, *Brentnall & Cleland Limited v. London County Council* [1945] 1 KB 115, Humphreys J, speaking of a report of one of his own previous decisions, said: ‘These short reports [...] ought to be accepted with a good deal of care. If I am correctly reported in *The Law Times* [...] I can only say, first that was an *obiter dictum*, and secondly that I think it was wrong. I have no recollection of saying anything of the sort, and I cannot believe that I said it”.

⁶⁵⁶ See also Zander (2004, pp. 310-326).

⁶⁵⁷ Especially because, as Zander (2004, p. 318) states, “by far the most important development in the field of law reporting is free access on the internet”.

⁶⁵⁸ As seen in Chapter 3, although they are integrated, each court manages its own system.

have systematically built more sophisticated online access tools (on their respective websites) to accurately publish their case law. As seen in Chapter 3, the idea is to collect all cases decided by the Brazilian courts, classifying them through a scheme of descriptors and numbers. These decisions are saved in an online database linked by topics according to the scheme descriptors and/or numbers. On the web pages, by searching for descriptors or numbers, researchers can find several cases related to issues of their interest. Identifying the case, they can consult the full version of the decision on the court web page. Despite the possible failures of the system of classification, any experienced lawyer can, in a short time, put together, with few exceptions, all the cases judged by a given court on a certain point of law.

More specifically, it can be mentioned that, for the issue of multiplicity of special appeals based upon a similar question of law (regulated by Law 11672/08, which altered the Code of Civil Procedure, as seen in Chapter 4), the Superior Court of Justice, on its website⁶⁵⁹, keeps track of the special appeals that have received the quality of paradigm for other similar special appeals. Consequently, the Federal Regional Courts, the State Courts of Justice or any lawyer can easily see their progress and what has been decided on the several matters. As previously seen in Chapter 4, concerning the requirement of general repercussion in extraordinary appeals, the Supreme Court Chief Justice's Office shall promote specific and broad publicising of the content of the decisions concerning this requirement and shall update the respective database.⁶⁶⁰ The Federal Supreme Court's webpage⁶⁶¹ provides an extensive list of issues for which the general repercussion has already been recognised as well as a list of issues in which it has not happened.⁶⁶² Upgraded in 2009, the system also allows everyone to have access to the themes that are being analysed and consult both the *rapporteur's* opinion and the final decision of the Supreme Court's Full Bench.⁶⁶³ Finally, with regards to the Supreme Court's Binding *Súmula*, in practice it is nothing more than an index, composed of

⁶⁵⁹ That is www.stj.jus.br.

⁶⁶⁰ See the Internal Regulation of the Federal Supreme Court, article 329.

⁶⁶¹ That is www.stf.jus.br.

⁶⁶² Until (and including) 2011, 509 issues of general repercussion had been accessed by the Supreme Court. See Supremo Tribunal Federal (2011, p. 49).

⁶⁶³ Actually, as seen in Chapter 4, based on the provisions of Law 11419/2006 and the Internal Regulation of the Federal Supreme Court, the entire procedure and judgment of the general repercussion issues in extraordinary appeals is currently managed electronically.

several statements, that presents the Supreme Court's solid case law on several legal issues. Through the *Súmula*, this case law is easily identified by a simple Internet search. The creation and periodical upgrade of these electronic/online tools is fundamental to the success of both procedural mechanisms. This is also part of a broader policy developed by the Brazilian Judiciary following the recommendations of Law 11419/2006, which disciplines the use of electronic media in the transmission of records, documents and communication of procedural acts, configuring a very important innovation in the Brazilian judicial process.⁶⁶⁴

In summary, the Brazilian example has demonstrated that it is possible to produce reliable free online official law reports. Brazilian courts have trained specialised personnel to perform this task. With the support of electronic and online tools that are currently generally available, although oversights occasionally occur, Brazilian courts have ensured broad, authentic and accurate free online access to their case law.

6.4.4 The Balance between Statutes and Precedents

What is the nature of the relationship between precedents and legislation in legal system, such as that of Brazil, which has traditionally emphasised the statute law? Has Brazil reached a good balance between legislation and precedents? How in such a legal system can judicial law-making be legitimated? These are some of the questions that this final topic – and this thesis as a whole – seeks to address. But these questions could not be fully addressed without first giving, as this thesis did, a complete account of how precedents are understood and how they operate in Brazil.

As seen throughout this thesis, in the past 20 years Brazil has progressively turned to common law countries in order to borrow ideas for the improvement of its legal system, especially a wider use of binding precedents. Based upon this new knowledge, Brazil has attempted to develop a doctrine of binding precedents in which the concepts and *modus operandi* do not affront the Brazilian historical, philosophical and legal backgrounds.

⁶⁶⁴ According to article 8º of this law, “the bodies of the Judicial Power are allowed to create and develop electronic systems for processing judicial actions by means of partially or totally electronic records, using preferably the internet, local or wide area networks”.

Many mechanisms that encapsulate a rule of binding precedents have been introduced into Brazilian law, most of them being discussed in Chapter 4. Finally, the Federal Supreme Court Binding *Súmula* (discussed in Chapter 5) is the climax of this progress towards an original mixed approach to precedents. This newly created Binding *Súmula*, it is important to note, is just the most recent step in a legal system that has recently approached the common law world, despite its historical adoption of statutory and codified law such as in Continental Europe.⁶⁶⁵

The last two decades have also seen an increase in the use of precedents in terms of frequency and creativity. As seen in Chapter 2, courts and judges' decisions nowadays rather infrequently refer only to the Constitution or the relevant statutes. Statutory provisions are frequently addressed by means of the discussion of relevant precedents. In this case, precedents have given support to the legislation, which gains persuasive force when embodied in one or more precedents. Precedents are also used as one of the main grounds of judicial decisions. In fields of law less comprehensively regulated by legislative provisions, precedents clearly play a very significant role. Besides, since the Federal Supreme Court and the Superior Courts mainly deal with issues of law, precedents really play a very important role in the rationale of their judgments.

This scenario clearly has challenged the myth that affirms the doctrine of binding precedent or *stare decisis* is an exclusive common law practice.⁶⁶⁶ The Brazilian experience has shown that the bindingness of judicial decisions is a characteristic freely auto-attributed by any legal system in order to achieve values such as stability, legal certainty, equality and speed in judicial decisions. In other words, the adoption of a rule of *stare decisis* by a legal system does not request its historical association with the common law tradition. The Brazilian experience has also put aside the myth that states that civil law judges, in terms of the creativity of their decisions, perform a different role when compared with their common law counterparts. Judicial reasoning, anywhere, is a much more sophisticated process

⁶⁶⁵ Since the Brazilian legal system is not based upon a general rule of *stare decisis*, most precedents are still persuasive. In any case, the existence of both binding and persuasive precedents in Brazil improves the effectiveness of the legal system because it entails both constraint and creativity. As Duxbury (2008, p. 27) reminds us, if precedents in all cases bound absolutely, judges would have little possibility to develop the law. Otherwise, if judges have the power to completely avoid precedents, the doctrine of *stare decisis* would not exist in any useful sense.

⁶⁶⁶ See Marinoni (2010b, p. 27).

than the simple act of declaring what the law is. The rules laid down by Brazilian judges sometimes go far beyond the limits of the cases from which they are derived. In Brazil, it is becoming quite clear that judges also make the law, and it can be proved by the evidence that some areas in Brazilian law, which were not originally statute regulated, have been considerably developed by case law.

It is also interesting to note that the Federal Supreme Court has pointed out the similarity that exists between legislation and precedents in the context of the Brazilian legal system. Frequently, the Court, with respect to the rationale of its decision, has considered the established case law as a true source of law. In this case, the Supreme Court has understood the “law” not only in the strictly formal meaning of legislative rules, but also in the substantive meaning of both legislative and judicial-making norms. In short, according to the Supreme Court, both legislation and precedents are “law” from a material perspective.⁶⁶⁷ Actually, as a rule, in the style contemporarily adopted by judges in Brazil, statutes and precedents are both equally stated as the basis for their decisions.

Indeed, it seems that Brazil is effectively reaching a very good balance between legislation and precedents. Let us take the example of the Federal Supreme Court’s Binding *Súmula*. There is no doubt that the *Súmula* represents a rupture with the tradition that has existed in Brazil (and in other countries that abide by Roman-Germanic tradition) based on legislative standards.⁶⁶⁸ However, as seen in Chapter 5, the model of the *Súmula* (or a statement of it) differs from the binding precedent in the common law doctrine of *stare decisis*.⁶⁶⁹

⁶⁶⁷ In the French legal tradition, as Steiner (2010, p. 104-105) states, the predominant conventional view “on the relationship between *jurisprudence* and legislation is that the former is subordinate to the latter. (...) The view that *jurisprudence* is subordinate to legislation is supported by two principal arguments. One relates to Parliament’s power to overrule judicial decisions. The other is concerned with judges who, in the general performance of their functions, regard themselves as being primarily bound by legislation”. However, Steiner (2010, p. 107-108) also asserts that, in France, “the complementary nature of legislation and *jurisprudence* has been particularly emphasised by Boulanger (1953:22) and this conclusion of his study is still as authoritative today as when originally written; *jurisprudence*, he notes, is ‘nothing other than the interpretation, the alteration and the finishing touch to enacted legislation’ (‘*la jurisprudence c’est la loi interprétée, modifiée, complétée*’). Elsewhere Boulanger (1961:11) further argues that precedents are ‘an integral part of the legislative text itself’. This relationship between the two sources derives from the fact that Parliament is only able to enact rules of general application. It is therefore incumbent upon the judiciary to give effect to these rules by applying them to the particular circumstances of cases arising before the courts. In other words, without and prior to judicial adjudication, legislative rules cannot by their nature be implemented”.

⁶⁶⁸ See Leite (2007, p. 21).

⁶⁶⁹ See Tavares (2007, pp. 131-132).

Most importantly, the Binding *Súmula* has a fundamental characteristic that is very suitable to a legal system, such as the Brazilian one, related to the civil law tradition: the validity of the statements of the *Súmula* is always conditioned by the support they have on the legislated norm.⁶⁷⁰ As seen in Chapter 5, it is true that there are several types of statements: merely declaratory (which basically repeats the text of law), *intra legem* (which, once there is a legislative provision for the theme, interprets it properly within the limits already established in the legal system) and *extra legem* (which fills in the blanks left by the legislation or extends the limits established by it). However, all of them were linked with legislated norms or norms that should have been legislated (in this case, exactly because the norms were not legislated there is the statement), “repeating” their texts, interpreting them, occupying the spaces left by them or expanding the limits previously established by them.

A binding statement’s stability will depend on the stability of the subjacent principle of the legislated norm to which it is related. Generally, a binding statement will not survive if the legislated norm that it refers to is changed (or a diverse norm is created, in case of a previous absence), so that the statement and the new text are incompatible. The statement can only survive if the change does not affect the subjacent principle according to which the statement was created.^{671,672} Furthermore, article 5º of Law 11417/06, which regulates the issue, states the possibility of revision or cancellation of a binding statement that becomes incompatible with the legislative norms (including the Constitution). This possibility of reviewing or cancelling a binding statement is extremely relevant. The statement can be conformed to the actual needs of the law and society, which are always in continuous transformation. Otherwise, it is possible to face the abnormal situation of having, at the same time, a binding statement which was not revised or cancelled (so it is binding for a constitutional command) and a statute with incompatible provisions with this statement.

Indeed, the Binding *Súmula* is not a case of simple adoption of a foreign model, preached by enthusiasts of foreign law. Considering the non-binding *Súmula* created in the 1960’s, the *Súmula* model has a history of achievements in Brazil. The

⁶⁷⁰ See Leite (2007, pp. 71-74).

⁶⁷¹ See Vigliar (2005, p. 292) and Leite (2007, p. 169).

⁶⁷² See the examples of the Statements 228 and 279 of the Federal Supreme Court’s classical *Súmula*, mentioned in Chapter 5.

classical non-binding *Súmula* has always been the object of profuse praise and considered “a compass in an extensive and exhaustive case law jungle”.⁶⁷³ Based on this history, the creation of the Supreme Court Binding *Súmula* presents a strong compatibility with the Brazilian legal traditions. Preserving the decentralised judicial review of legislation, more adequate to the continental dimensions of Brazil, the Binding *Súmula* was the solution found to give a reasonable degree of uniformity to the Brazilian constitutional case law. At the same time, it keeps the link between the Brazilian legal system and the civil law tradition, marked by the statute law’s fundamental role, because, as already seen, any changes in the legislation can imply the cancelling or alteration of the pertinent binding statement.⁶⁷⁴

Once recognised this reality, a point for further discussion is the question of the legitimacy of the judicial law-making in Brazil. Certainly, this question of the limits of judicial power in creating law is not exclusive to Brazil. In France, for instance, Steiner says that “the question has become not so much whether jurisprudence [case law] is a source law, but rather what is the source of legitimacy for jurisprudence”.^{675,676} In all legal systems of civil law background, such as France and Brazil, there has been a similar defiance to the expansion of judicial law making.⁶⁷⁷

Firstly, the legitimacy of binding and creative precedents in Brazil depends on the factors/standards of performance improvement in the deliverance of justice that were addressed earlier in this chapter: stability, certainty, equality and speed, among others. The achievement of better standards of stability, certainty, equality and speed, by a proper manipulation of precedents in the practice of the courts, can decisively contribute to placing greater weight on the role of precedents in Brazil. Unarguably, as seen in this chapter, concerning these standards, the Brazilian judicial system has recently undergone positive qualitative changes.

⁶⁷³ See Lopes (1988, pp. 94-95).

⁶⁷⁴ See Marinoni (2010b, p. 78).

⁶⁷⁵ See Steiner (2010, p. 110).

⁶⁷⁶ According to Summers (2000, p. 210): “Even in France where most courts at the highest level do not even cite precedent in their decisions, precedent in fact has normative force and often plays a crucial role. The present day law in France would be incomprehensible without reference to the precedent of higher courts. For example, nearly all of the French law of torts is judge-made. So is French administrative law. Even though the relevant precedents are not usually cited in the highest courts, the French judges are, in usual cases, attempting to follow settled precedents, and judges who fail to follow them will be subject to criticism by other judges, by scholars, and by practitioners”.

⁶⁷⁷ Steiner (2010, p. 87).

Secondly, according to some authors, “what justifies judicial law making is the implicit acceptance of precedents by the legislature. Through its silence and inaction the legislature implicitly accepts that precedents are law. This is further confirmed by the fact that, very often, the legislature adopts a precedent by converting it into legislation”.⁶⁷⁸ In Brazil, important judicial decisions often lead (and are used as the ground) for subsequent legislation. More importantly, it is with the clear support of the Brazilian Lawmaker (including those that created and those that reformed the Federal Constitution), as seen throughout this thesis, that several rules of *stare decisis* are being incorporated into Brazilian law.

Thirdly, some say that is “a consensus of opinion amongst the legal community which validates judicial law making. According to Maury this consensus is formed from recognition of the validity of precedents arising out of their acceptance by the legal community and the public at large or, even, out of the absence of any opposition to them. Thus, according to this view, judges in following precedents – and practitioners by using them in court – both ‘adhere’ to the binding character of precedent”.⁶⁷⁹ All involved in the Brazilian legal community – which includes the Legislator, the Federal Supreme Court, the superior courts, the appellate courts, judges, lawyers, scholars and parties in general – are arriving at the same point. The judicial decisions enjoy the same *de facto* authority as any statutory text. Judges frequently follow them and citizens/parties consider them to be as much law as legislation itself is. One good example of this, mentioned in Chapter 4, is the case of the Resolutions of the Superior Electoral Court that are invariably followed, based much more on the certainty of the futility of opposing an understanding of a superior court during time of electoral proceedings than on the knowledge of the existence of a binding effect (whether it constitutionally exists or not). Furthermore, nowadays, in Brazilian law schools, lecturers work with the relevant judicial precedents concerning a specific matter (above all, those from the Federal Supreme Court) as they do with the pertinent legislation.⁶⁸⁰

⁶⁷⁸ See Steiner (2010, p. 111). According to her, “the main argument put forward against this analysis is that it is a fiction to say that Parliament, through its inaction, approves of a precedent, since most of the Members of Parliament are generally unaware of the content of judicial decisions”

⁶⁷⁹ Steiner (2010, p. 111).

⁶⁸⁰ The same occurs in France, according to Steiner (2010, pp. 106-107).

There are even proposals concerning the adoption of a general rule of binding precedents in Brazilian law. For instance, Marinoni, a prestigious Brazilian scholar, proposes to incorporate into the Code of Civil Procedure the following provisions:

The binding effect of the determining fundamentals of the decision:

Article 1º – The determining fundamentals of the decision shall bind the court which rendered it, as well as the lower courts and judges under its jurisdiction, in all future cases related to them.

Articles 2º – They shall have binding effect:

I – The Federal Supreme Court's decisions in decentralised or centralised judicial review of legislation;

II – The Superior Court of Justice's decisions that reached an understanding on the interpretation of the federal legislation;

III – The decisions of the state appellate courts of justice and of the federal regional courts that, in the incident to declare the unconstitutionality of a normative act in decentralised judicial review of legislation or in the incident of standardisation of case law of the Code of Civil Procedure, defined the respective constitutional question and controversial legal issue.

Article 3º – They shall not have binding effect:

I – the fundamentals that, although present in the decision, are not determining to reach the conclusion;

II – the fundamentals that, although determining to the conclusion of the decision, have not been adopted or endorsed by the majority of the members of the court.

Article 4º – The determining fundamentals of the interlocutory decision of a collegiate court shall have binding effect since they have been adopted or endorsed by the majority of the members of the court.

Article 5º – Binding precedents may not be followed if the supposed bound court or judge demonstrates, through rational argument and convincing justification, that the case in trial, for specific factual or legal situation, deserves a distinguished decision.

Article 6º – In special circumstances, duly demonstrated and justified, the court may revoke its precedents.

Sole Paragraph - Precedents that have become inconsistent with decisions of the Superior Courts, regardless of revocation, shall not be applied any more.

Article 7º – The court, in the case of revoking its precedent, shall define the temporal effects of its decision. The court may limit the retroactive effects of its decision or give to it prospective effects, balancing the degree of reliance on the revoked precedent and the relevance of an immediate application of the decision to the equal treatment of all affected people.

Article 8º – If a binding precedent is not followed, a “*Reclamação*” (a Constitutional Claim) can be filed before the court that have proffered it (the binding precedent).

§ 1º – The *rappporteur* of the “*Reclamação*” may suspend the proceeding of the case where the binding decision was not followed.

§ 2º – The favourable decision in the “*Reclamação*” shall annul the claimed decision, determining that a new decision shall be proffered in compliance with the binding precedent.⁶⁸¹

Fourthly, another important factor, linked with both the acceptance of precedents by the Legislature and the consensus of opinion amongst the legal community, is the acceptance of the judicial law-making by the public opinion. As Rui Barbosa stated a long time ago, “the majesty of the courts is based on public esteem”.⁶⁸² Alexandre Moraes, writing on the judicial review of legislation, reminds us that “the decisions that contradict the general consensus simply do not endure”.⁶⁸³

If the recipients of the judicial decisions are both the legal and the lay communities, it is very important, for the legitimacy of the judicial law-making, that both are able to verify, by efficient tools of law reporting (which Brazil has been developing), if the judges and, consequently, the Judiciary as a whole, decide impartially and accurately. It is through the motivation of the judicial decisions that one can evaluate the exercise of judicial functions.⁶⁸⁴ Judicial decisions should always be well motivated, enabling an easy access to the elements of the reasoning, as well as appropriately publicised.^{685,686} The Brazilian Constitution of 1988, article 93, IX, actually states that “all judgements of the bodies of the Judicial Power shall be public, and all decisions shall be justified, under penalty of nullity, but the law may limit attendance, in given acts, to the interested parties and to their lawyers, or only to the latter, whenever preservation of the right to privacy of the party interested in confidentiality will not harm the right of the public interest to information”. As Rui Barbosa also stated, “the authority of justice is moral. And it is maintained by the morality of their decisions”.⁶⁸⁷

⁶⁸¹ See Marinoni (2010b, pp. 519-521)

⁶⁸² Barbosa, Rui. *Obras completas de Rui Barbosa*, vol 19 (Rio de Janeiro, Secretaria da Cultura – Fundação Casa de Rui Barbosa, 1991), p. 300.

⁶⁸³ Moraes, Alexandre de. Legitimidade da Justiça Constitucional. *Revista Diálogo Jurídico*, Salvador, CAJ - Centro de Atualização Jurídica, v. 1, n. 8, novembro, 2001, p. 15 <<http://www.direitopublico.com.br>> accessed 8 August 2012.

⁶⁸⁴ Fernandes, Antonio Scarance. *Processo penal constitucional* (São Paulo, RT, 1999), p. 117.

⁶⁸⁵ See Fernades (1999, p. 63) and Marinoni (2010, p. 246).

⁶⁸⁶ Interestingly, nowadays, all the important judicial meetings and decisions of the Brazilian Federal Supreme Court are broadcasted live.

⁶⁸⁷ See Barbosa (1991, p. 300).

On the other hand, the main critique against the arguments of functionality (in terms of stability, certainty, equality and a swifter justice, for instance), acceptance from the Legislator, legal community consensus and acceptance by the public opinion is that the constitutional framework in Brazil, particularly the principle of the rational persuasion of the judge (or freedom to interpret law) and the principle of the separation of powers, militate against such a form of binding law-making”.⁶⁸⁸

As seen earlier in this chapter (and throughout this thesis), this is not true. The establishment of a more comprehensive approach to binding precedent in Brazil (for instance, of the Supreme Court’s *Súmula Vinculante*) do not prevent judges or lower courts, although it is not very practical, from departing from an (apparently) binding precedent of a higher court or even of the Supreme Court. There are no disciplinary sanctions for this. Commonly, the consequence of this is simply to file a *Reclamação* to the Supreme Court in order to provoke it to restore the authority of the binding decision.⁶⁸⁹

The doctrine of the separation of powers is also not so strict to the point of totally forbidding the exercise, by one of the State’s powers, of a function usually attributed to another power. As seen previously, Brazil has currently seen the development of a new conception of the principle of the separation of powers, which focus on the idea of a sharing of powers.⁶⁹⁰ Checks and balances mechanisms are widely common in Brazil, such as the judicial review of legislation.

In the case of the judicial review of legislation specifically, it is very important to emphasise that, when challenged to access the constitutionality of statutes, Brazilian courts invariably make clear that they are empowered to review the constitutionality of existing legislation. For Brazilian judges, what justifies the legitimacy of constitutional justice is the idea of complementarity between democracy and rule of law. Democracy is government of the majority, based on popular sovereignty. The rule of law enshrines the supremacy of constitutional norms, the respect for fundamental rights and the jurisdictional control of state powers, not only to protect the majority, but also the rights of the minority. Thus, it is absolutely

⁶⁸⁸ Concerning the similar argument in France, see Steiner (2010, p. 111).

⁶⁸⁹ See again the excerpt of the opinion of Justice Nery da Silveira in *Ação Declaratória de Constitucionalidade – ADC-MC 4/DF – STF – Full Bench – Rapporteur Justice Sydney Sanches – j. 11-2-1998 – DJ 21-5-1999 – EMENT 1951-1 – RTJ 169 pp. 432-433*, quoted in Chpater 2.

⁶⁹⁰ See Cappelletti (1990, p. 111-112).

necessary to reconcile the Parliament (which represents the democratic principle and the government of the majority) with the constitutional courts (which guarantee the rule of law and the rights of the minority).^{691,692}

Besides, as Otto Bachof warned us some time ago, it is nonsense to insist in affirming that the Judiciary is antidemocratic. The judge is not less linked with the people than the other state bodies. The President, Governors of States, Mayors and civil servants have only an indirect mandate of the people. Even Parliament cannot be considered as directly commissioned, because its deliberations are in fact much more connected to the political parties' arrangements. Furthermore, more important than the class of the mandate is the function performed. Judges administer justice on behalf of the people – and this is not an empty formula – in the same way that the Parliament enacts laws and a government rules on behalf of the people.⁶⁹³

Maybe the most important point is that, in truth, the legitimacy of the judicial law-making in Brazil comes directly from the Federal Constitution, which expressly established several cases of creative and binding precedents. It is enough to cite the decisions of the Federal Supreme Court in the centralised judicial review of legislation and the *Binding Súmula*. It is assumed that the “people”, in both moments of promulgation and reform of the Federal Constitution, through the exercise of Constituent Power, give a mandate to the Judiciary to exercise some degree of law-making.⁶⁹⁴

Finally, as previously stated, the post-positivism (or the neo-constitutionalism) in Brazil⁶⁹⁵ brings into courts issues that were traditionally placed outside the borders of the law: politics, several fundamental social rights and, above all, a potential transformation of society through or by the law. More than 20 years after the advent of the Federal Constitution of 1988, judges in Brazil do not manipulate exclusively

⁶⁹¹ Troper, Michel. *Justice constitutionnelle et démocratie*. Revue Française de Droit Constitutionnel (Paris, Presses Universitaires de France, 1990), p. 31.

⁶⁹² Concerning judicial review of legislation and democracy, see Barak, Aharon. The Role of the Supreme Court in a Democracy. In Andenas, Mads and Fairgrieve, Duncan (eds). *Judicial Review in International Perspective* (The Hague/The Netherlands, Kluwer Law International, 2000), pp. 121-129.

⁶⁹³ Bachof, Otto. *Jueces y constitución* (Madri, Civitas, 1987), p. 59.

⁶⁹⁴ Concerning a similar understanding in USA, see: Cooley, Thomas. *Princípios gerais de direito constitucional dos Estados Unidos da América do Norte* (2nd ed, São Paulo, RT, 1982), p. 142; and Schwartz, Bernard. *Direito constitucional Americano* (Rio de Janeiro, Forense, 1966), p. 26.

⁶⁹⁵ Concerning a post-positivist approach to precedents in Brazil, see Bustamante (2007, above all pp. 119-218) and Tavares (2007, pp. 37-47).

individual cases, but also those which, for the massive impact they can have, involve a considerable part of the community. This overcomes the idea that attributes the abstract and generic treatment of law to the Parliament and confines the judge to the solution of concrete and individual cases.⁶⁹⁶ Based on this neo-constitutionalist interpretation of the Federal Constitution, the Brazilian judicial power must give effect to the substantive constitutional norms, which protect values such as equality, predictability and speed in judicial decisions. Following this desideratum, the Brazilian law must adopt mechanisms that improve the performance of the Judiciary as a whole. One of the measures to be taken, as previously said, is the adoption of effective rules of creative and binding precedents.

6.5 An Epilogue

The question of superiority between the models of civil law and common law has long lost its importance.⁶⁹⁷ The advantages and disadvantages of the common law are somewhat symmetrical to those of the civil law. While the former requires the adoption of general and abstract rules in order to give a more systematic approach to law, the second commonly lacks the binding precedent and the concretism provided by the case law to better define the patterns of the conducts regulated by statutes and codes.⁶⁹⁸

Furthermore, as anticipated in Chapter 1, currently there is no longer a pure model. In spite of having different origins, countries related to the tradition of civil law and countries connected to the tradition of common law have had innumerable contacts with one another over the centuries. From the perspective of common law countries, the importance of statutes has constantly increased. As MacCormick points out, in more recent times, even in common law legal systems, it is very difficult to find a pure case law. Much of the case law takes the form of interpretation (glosses) of the statute law.⁶⁹⁹ Conversely, even in the continental European law, the

⁶⁹⁶ See Dinamarco (2002, p. 1.135) and Marinoni (2010, pp. 244-245).

⁶⁹⁷ See Merryman, John Henry. *La Tradición Jurídica Romano-Canónica* (Carlos Sierra tr, 2nd ed, México, Fondo de Cultura Económica/FCE, 1989), p. 19.

⁶⁹⁸ See Losano (2007, pp. 336-337).

⁶⁹⁹ MacCormick, Neil. *Rhetoric and the Rule of Law – a Theory of Legal Reasoning* (New York, Oxford University Press, 2005), p. 176.

fundamental role of precedents and their creative character are largely recognised.⁷⁰⁰ Currently, there is nothing more equivocal than to imagine that judges are only bound to statutes in legal systems related to the tradition of civil law or that they only rely on precedents in systems that belong to the common law. Many areas of law in the legal systems of both traditions are shaped by the Parliament, and in all of these legal systems, in a greater or lesser degree, judges also rely on precedents.⁷⁰¹

The Brazilian case was presented here as a good example of a legal system that, historically built under a civil law perspective, has turned to a more comprehensive approach to precedents. In order to have more stability, legal certainty, equality and speed in judicial decisions, Brazilian law has adopted a new approach to binding precedents, which culminated with the creation of the new Binding *Súmula* of the Brazilian Federal Supreme Court. Progressively, it is believed, Brazil will become a new example of a mixed system or what might be known as a country related to this 'new' Western legal family.

Reflecting the purposes presented in the introductory chapter, it was possible, by conceptualism and comparative law working together, to achieve a taxonomy of the theory of precedents in Brazil that is clearly concerned with: (i) its inner harmony and coherence;⁷⁰² (ii) the harmony and coherence with the legal system that it is related to – the Brazilian system; (iii) and the similarities and differences between common law and civil law traditions. Certainly, a systematisation of this kind can be very valuable because it may be a potent tool in breaking down the barriers of mutual ignorance which sometimes split common and civil lawyers.^{703,704}

Finally, this thesis does not have the intention of demonstrating that the Brazilian model of precedents is superior to any other model of precedents and, therefore, recommending any kind of radical transplant. This thesis sought to demonstrate that the Brazilian mix of civil and common law elements – a very synergic one, in which the positive aspects have overthrown the potential problems –

⁷⁰⁰ See Alexy, Robert. *Teoria da Argumentação Jurídica* (Zilda Hutchinson Schild Silva tr, São Paulo, Landy, 2001), p. 258.

⁷⁰¹ See Summers (2000, p. 210).

⁷⁰² See Grossefeld (1990, pp. 9-10).

⁷⁰³ See Gutteridge (1971, p. 124).

⁷⁰⁴ After all, as Zucca (2007, in paperback 2008, pp. 13-14) states, "if the theoretical results are accurate, they can be applied to any legal systems indistinctly".

can play a role in the development of the theory of precedents in both civil and common law legal worlds. As Brazil has been one of the fastest growing countries in terms of economic and political development over the last few years, it can be used as a tool for both researchers and those dealing with law reform.

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⁷⁰⁵ All the first 370 statements of the Federal Supreme Court's non-binding Súmula were approved in 13 September 1963. They were originally published in Supremo Tribunal Federal. (1964) *Súmula da Jurisprudência Predominante do Supremo Tribunal Federal – Anexo ao Regimento Interno*. Brasília: Imprensa Nacional.

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Appendix I - The Brazilian Judicial System: an Overview

Some words about the organization of the Brazilian judicial system should certainly be useful (maybe necessary) for a better understanding of this thesis. First of all, the entire Brazilian legal system is covered by the Federal Constitution of 1988, the fundamental law of Brazil. Up until April 2012, there have been 76 amendments to the Federal Constitution. One of them is the Constitutional Amendment 45/2004, known as “the Reform of the Judiciary”, which implemented profound changes in the chapter of the Constitution related to the Judicial Power.

The Federal Constitution, article 92, with the new text given by Constitutional Amendment 45, states that the following are the bodies of the Brazilian Judicial Power: “I - the Federal Supreme Court; I-A – the National Council of Justice; II – the Superior Court of Justice; III – the Federal Regional Courts and the Federal Judges; IV – the Labour Courts and Judges; V – the Electoral Courts and Judges; VI – the Military Courts and Judges; VII – the Courts and Judges of the states, of the Federal District and of the territories”. The Federal Supreme Court, the National Council of Justice and the Superior Courts have their seat in the Federal Capital (Brasília) and jurisdiction over the entire Brazilian territory.

The Federal Supreme Court is the highest court in Brazil. According to article 101 of the Constitution, it is composed of eleven Justices (“*Ministros*”), chosen from among citizens over thirty-five and under sixty-five years of age, of notable juridical knowledge and spotless reputation. The Justices of the Federal Supreme Court shall be appointed by the President of the Republic, after their nomination has been approved by the absolute majority of the Federal Senate. Once in office, a Justice will only forfeit the position by resignation, compulsory retirement (at 70 years old) or impeachment. Periodically, one of the Justices is elected to be the Chief Justice for a mandate of two years (as a rule in all Brazilian courts, it will be the most senior Justice that has not yet occupied the post). According to article 109 of the Constitution, the Supreme Court is responsible, essentially, for safeguarding the Constitution, which includes the protection of the political system and the civil liberties. It is within its competence, for instance, the trial of the direct actions of unconstitutionality and declaratory actions of constitutionality, and to judge, on

extraordinary appeal, cases decided in a sole or last instance, when the decision appealed is contrary to a provision of the Constitution⁷⁰⁶. Thus, in Brazilian constitutional law, the Federal Supreme Court is also a kind of “Constitutional Court”. Generally, the Federal Supreme Court deals only with issues of law, both procedural and substantive, and not with issues of fact. The court acts by its Full Bench (called “Plenary”), its two Panels, its Presidency or a Justice monocratically. The function performed by the Federal Supreme Court inside the Brazilian System, as shown throughout this thesis, has become more and more important in the last years because of the (new) general bindingness attributed to some of its precedents.

Considering the non-specialised courts of the Brazilian Judicial Power, in a degree immediately below the Federal Supreme Court comes the Superior Court of Justice, which is essentially responsible for the uniformity of the interpretation of the federal law⁷⁰⁷. It is a national court, dealing with cases linked with both the non-specialised federal courts and the states courts. According to article 104 of the Constitution, the Superior Court of Justice is composed of a minimum of thirty three Justices (and currently, it is actually its number). The Justices shall be appointed by the President of the Republic chosen from among Brazilians over thirty-five and under sixty-five years of age, of notable juridical knowledge and spotless reputation, after the nomination has been approved by the absolute majority of the Federal Senate⁷⁰⁸. Among other duties, it has the jurisdiction to judge, on special appeal, the cases decided, in a sole or last instance, by the Federal Regional Courts or by the Courts of Appeal of the states, of the Federal District and the Territories, when the decision appealed is contrary to a federal law (or denies its effectiveness), considers valid an act of a local government challenged in the light of a federal law or confers upon a federal law an interpretation different from that which has been conferred

⁷⁰⁶ As civil and criminal court of last resort, the Federal Supreme Court has other very important duties, which are not directly linked with the judicial review of legislation. For instance, it is its duty to judge, in common criminal offenses, the President of the Republic, the Vice-President, the members of the National Congress, its own Justices and the General-Prosecutor of the Republic, and the lawsuits against the National Council of Justice and against the National Council of the Public Prosecution.

⁷⁰⁷ See Barroso, Luis Roberto. *Constitutional Law*. In Deffenti, Fabiano and Barral, Welber (eds). *Introduction to Brazilian Law* (Alphen aan den Rijn/The Netherlands, Kluwer Law International, 2011), p. 24.

⁷⁰⁸ One-third of the Justices shall be chosen from among judges of the Federal Regional Courts and one-third from among judges of the State Courts of Justice. One-third, in equal parts, shall be chosen from among lawyers and members of the Public Prosecution Service.

upon it by another court. Generally, the Superior Court of Justice deals only with issues of law, both procedural and substantive. The Superior Court of Justice is also frequently a court of last resort. Its judgments may be revised by the Federal Supreme Court, but basically on constitutional grounds.

As a federation, Brazil has an entire system of non-specialised federal courts. According to article 106 of the Constitution, it comprises the Federal Regional Courts and the Federal Judges (filling the several courts of first instance in all states of the federation). Currently, Brazil has five Federal Regional Courts and about 1500 federal judges. Among others duties, the federal courts have jurisdiction over civil cases in which the Union, an autonomous federal government agency or a federal public company have an interest as plaintiffs, defendants or interveners, as well as criminal offenses committed against the assets, services or an interest of the Union or of its autonomous agencies or public companies. The Federal Courts have a subsystem of Small Claims Courts. The subsystem is composed by several single courts, at least one appellate panel per state and one higher panel for a national standardisation of the law (seated in Brasilia/Federal District). The Federal Small Claims Courts deal with disputes of a monetary value of up to 60 minimum wages⁷⁰⁹, criminal offenses of lower offensive potential and other cases of small complexity, by simpler rules and procedures. It is mainly regulated by Law 10259/2002.

The Constitution also establishes a system of Labour Courts, which are responsible for individual and collective lawsuits related to employment relation disputes. According to article 111 of the Constitution, the system is composed by the Superior Labour Court, the Regional Labour Courts and Labour Judges. The Superior Labour Court is composed of twenty-seven Justices, chosen from among Brazilians over thirty-five and under sixty-five years of age, appointed by the President of the Republic after approval by the absolute majority of the Federal Senate⁷¹⁰. Currently, each state of the federation has one Regional Labour Courts.

The system of Electoral Courts, according article 118 of the Constitution, is composed by the Superior Electoral Court, the Regional Electoral Courts, the Electoral Judges and the Electoral Boards. The Superior Electoral Court is

⁷⁰⁹ In Brazil, a national minimum wage per calendar month is established annually.

⁷¹⁰ One-fifth of them are chosen among lawyers and among members of the Labour Public Prosecution; the others, among judges of the Regional Labour Courts, nominated by the Superior Labour Court.

composed of seven members. Three of them are Justices of the Federal Supreme Court and two are Justices of the Superior Court of Justice. The others two members are appointed by the President of the Republic among six lawyers of notable juridical knowledge and spotless reputation nominated by the Federal Supreme Court. There is a Regional Electoral Court in each capital of state and in the Federal District.

There is also the system of (Federal) Military Courts. According to article 122 of the Constitution, it is composed by the Superior Military Court and the Military Courts and Judges instituted by law. The Superior Military Court is composed of fifteen life Justices, appointed by the President of the Republic, after their nomination has been approved by the Federal Senate⁷¹¹. Basically, the Military Courts have the competence to carry out the trial of military crimes as defined by law.

Finally, according to article 125 of the Constitution, all states should have their own judicial systems, observing the principles established in the Constitution. Some rules of competence of the state courts are defined in the Constitutions of the states and the respective law of judicial organization. The 27 state systems (26 states plus the Federal District) are composed by one Appellate Court of Justice (“*Tribunal de Justiça*”) and several courts of first instance (filled by single judges)⁷¹². All the state systems have a subsystem of Small Claims Courts. Several single courts, some appellate panels and a panel for the standardisation of the case law compose these subsystems. The Small Claims Courts deal with disputes of a monetary value of up to 40 minimum wages, criminal offenses of lower offensive potential and other cases of small complexity, by simpler rules and procedures. It is mainly regulated by Law 9099/1995.

The Brazilian Judicial System can be also classified in two more different ways. It can be divided into “federal courts” (including the Federal Courts in a strict sense, the Labour Courts, the Electoral Courts and the Military Courts) and “state courts”. It can also be divided into “non-specialised courts” (the Federal Courts in a strict sense and the State Courts) and “specialised courts” (the Labour Courts, the

⁷¹¹ Ten of the Justices should be chosen from among General officers of the Navy, the Army and Air Force (all of them in active service and in the highest rank of the career) and five from among civilians (article 123 of the Constitution).

⁷¹² According to § 3^a of article 125 of the Federal Constitution, by proposal of the Appellate Courts of Justice, a state law may create a State Military Justice, constituted, at first instance, by judges and by the Councils of Justice and, at second instance, by the Court of Justice itself, or by the Court of Military Justice in those states in which the military troops count more than twenty thousand members.

Electoral Courts and the Military Courts). It is important to notice that the Superior Court of Justice, as a “national” court, is placed above and outside both systems of non-specialised courts (Federal Courts and State Courts). And the Federal Supreme Court is placed above (and outside) all systems and courts.

Apart from the labour courts (which deal only with civil labour matters), all other courts perform both civil and criminal functions. Certainly, in collegiate courts there are chambers or panels dealing only with civil cases, and other chambers or panels dealing only with criminal matters. In big cities also, where there are several single judges of first instance, some of them deal only with civil cases, and others deal only with criminal issues.

It is also very important to highlight that in Brazil all legislation and judicial decisions must conform to the Federal Constitution. This includes the State’s Constitutions and “Organic Laws” of the Federal District and the Municipalities. The Judicial Power, headed by the Federal Supreme Court, is in charge of the control of the constitutionality of the legislation and other juridical acts. Judges should act as instruments for the defence of Constitution. As shown throughout this thesis, currently, under the Constitution of 1988, Brazil adopts the two main models of judicial review of legislation: the decentralised, as in the American model, and centralised⁷¹³, the model developed in continental Europe.

Constitutional Amendment 45 created the new National Council of Justice (“*Conselho Nacional de Justiça*” or “*CNJ*”). Placed in the Federal Capital, according to article 103-B of the Constitution, it is composed by fifteen members with more than thirty-five and less than sixty-six years of age, with a term of two years (one re-conduction admitted), and headed by the president of the Federal Supreme Court. They are given office by the President of the Republic, after the appointments are approved by the absolute majority of the Federal Senate⁷¹⁴. The Council is

⁷¹³ This concentrated judicial review is operated in Brazil through direct actions. The two most important actions, which are presented before the Federal Supreme Court, are: the direct action of unconstitutionality of a federal or state law or normative act (Federal Constitution, article 102, I, “a”, first part) and the declaratory action of constitutionality of a federal law or normative acts (article 102, I, “a”, second part). The decisions pronounced by the Federal Supreme Court in these actions have a binding effect as regards to the other courts of the judicial branch and the administration as a whole.

⁷¹⁴ The composition is very plural, necessarily representing the several careers linked with the administration of the justice in Brazil: (i) one Justice from the Federal Supreme Court, appointed by the respective Court; (ii) one Justice from the Superior Court of Justice, appointed by the respective Court; (iii) one Justice from the Superior Labour Court, appointed by the respective Court; (iv) one senior judge (*desembargador*) from a State Appellate Court (*Tribunal de Justiça dos Estados*), appointed by the Federal Supreme Court; (v) one state judge, appointed by the Federal Supreme

responsible, essentially, for a complementary administrative and correctional control of the Judiciary Power. It is its prerogative, for instance, the control of some administrative and financial acts of the Judiciary and of the fulfilment of functional duties by the Judges. Apart from the fact that the General Prosecutor of the Republic and the President of the Brazilian BAR Association shall officiate before the Council, the Constitution also assures the right for any citizen to denounce directly to it a misconduct of any judge, body or auxiliary service of the Judiciary⁷¹⁵.

The Constitution grants the Judicial Power's independence with respect to the other Powers of the Republic. According article 99 of the Constitution, the Judicial Power is ensured of administrative and financial autonomy. As a general rule (see article 96 of the Constitution), the Brazilian courts elect their directive bodies and to draw up their internal regulations (in compliance with the rules of the Brazilian procedural legislation), they propose the creation of new courts of first instance and they fill offices of career judges under the general terms of the Constitution.

The method of recruitment of judges adopted in Brazil seeks to conform to the role that judges are expected to perform in the Brazilian Constitutional framework. It encapsulates both the ideas of independence and efficiency in the profession. Unlike England (whose judges are selected from the ranks of barristers), the Brazilian judiciary is a completely independent career. Basically, the recruitment for all the

Court; (vi) one senior federal judge from a Regional Federal Court, appointed by the Superior Court of Justice; (vii) one federal judge, appointed by the Superior Court of Justice; (viii) one senior judge from a Regional Labour Court, appointed by the Superior Labour Court; (ix) one labour judge, appointed by the Superior Labour Court; (x) one member from the Federal Public Prosecution Service, appointed by the General Prosecutor of the Republic; (xi) one member of the States' Public Prosecution Services, chosen by the General Prosecutor of the Republic among the names appointed by the competent body of each State institution; (xii) two lawyers, appointed by the Federal Council of the Brazilian BAR Association; (xiii) two citizens, of notable juridical learning and irreproachable reputation, one appointed by the House of Representatives and other by the Federal Senate.

⁷¹⁵ Besides other prerogatives determined by the Organic Law of the Judicature (Complementary Law 35/1979), the National Council of Justice shall to (i): to zeal for the autonomy of the Judiciary Power and for the observance of the Organic Law of the Judicature; (ii) to zeal for the legality of administrative acts performed by members or bodies of the Judiciary Power, with powers to annul them, alter them or fix terms for the adoption of the measures necessities to the exact obedience of law, without prejudice of the competences of the Court of Accounts of the Union; (iii) to hear of and examine the complaints against members or bodies of the Judiciary, including those against their auxiliary services, without prejudice of the correctional and disciplinary competences of the courts, with powers to avocate current disciplinary cases and to determine the reallocation or the retirement with remuneration proportional to time in office as well as apply other administrative sanctions, ample defence being ensured; (iv) to rectify, by own initiative or when provoked, the disciplinary cases involving judges with less than one year of judgment; (vii) to prepare annual report, with proposals of the measures deemed as necessities, about the status of the Judiciary in the country and the activities of the Council, which shall be part of the message by the President of the Supreme Federal Court to be forwarded to the National Parliament, by occasion of the opening of the legislative year.

judges of first instance in Brazil is managed by competitive entrance examinations. This method of recruitment bases on the academic qualification and aptitude of the would-be judges⁷¹⁶, rather than the merits of their professional background. This can be clearly contrasted with the English method that gives decisive value to the professional experience. The competitive entrance examinations are open to candidates that have completed a period of three years of experience as advocates after successful completion of the first degree in law. Entrance examinations consist of written papers, oral test and a final evaluation of the candidate's titles (publications, previous professional experiences, among others). After the examinations and the actual selection, there is a training period that follows a specific programme of studies. It is both theoretical and practical, but with a clear emphasis placed on the challenges that the new judges will find in their careers⁷¹⁷. According to article 93 of the Constitution, the promotions from level to level of the career are based on seniority and merit, observing the general rules established by the Constitution itself. As a rule, access to the appellate courts shall also obey seniority and merit. The number of judges in Brazil consisted, at the end of 2010, of 16,804 (considering the Federal, Labour and State Courts), about 9 judges per group of 100,000 inhabitants⁷¹⁸. There is a compulsory retirement for all judges at the age of 70.

Judges in Brazil enjoy the guarantees of life tenure and irremovability and their salaries can never be reduced. But they are forbidden: to hold another office or position, except for a teaching position; to receive, on any account or for any reason, court costs or participation in a lawsuit; to engage in political or party activities; to receive, on any account or for any reason, financial aid or contribution from individuals, and from public or private institutions, save for the exceptions set forth in law; and to practice law in the court or tribunal on which they served as judges, for a

⁷¹⁶ Consisting in large part of young, as in Brazil a first degree in law is generally finished at an average age of 23, high qualified male and female.

⁷¹⁷ In Brazil, as seen previously, the Constitution determines that at the higher levels judges/justices shall be appointed by the Executive Power (with the agreement of the Parliament). In this case, political influence still is decisive. This influence can undermine the idea of high standards of quality to be expected from an appointed high ranked judge. But it must be pointed out that these "political" appointments represent a small percentage (less than 2%, certainly) of the total number of posts of judges.

⁷¹⁸ See Conselho Nacional de Justiça - CNJ. *Justice in Numbers 2010 - Indicators of the Judiciary Power - Overview of the Brazilian Judiciary Power - Executive Summary* (Brasília, Conselho Nacional de Justiça – CNJ, 2011), pp. 5-6.

period of three years following their retirement or discharge (article 95 of the Constitution). These rights and duties are justified by the need to safeguard the independence of the Judiciary.

The Federal Constitution also considers some legal functions essential to the deliverance of justice. The first of them is the Public Prosecution Service. According to article 128 of the Constitution, the Public Prosecution Service in Brazil comprises: I – the Public Prosecution of the Union, which includes the Federal Public Prosecution, the Labour Public Prosecution, the Military Public Prosecution and the Public Prosecution of the Federal District and the Territories; II – the Public Prosecutions of the states. The head of the Public Prosecution of the Union is the General Prosecutor of the Republic⁷¹⁹, appointed by the President of the Republic from among career members over thirty-five years of age, after his name has been approved by the absolute majority of the members of the Federal Senate, for a term of office of two years (reappointment being allowed)⁷²⁰. The Public Prosecution is ensured of functional and administrative autonomy, and it may propose to the Legislative Power the creation and abolishment of its offices and auxiliary services, filling them, as happens in the Judicial Power, through competitive entrance examinations. Its duty is to defend the juridical order, the democratic regime and the inalienable social and individual interests (article 127). According to article 129 of the Constitution, the following are some of the specific functions of the Public Prosecution Service: to initiate public criminal prosecution, under the terms of the law; to ensure effective respect by the Public Authorities and by the services of public relevance for the rights guaranteed in the Constitution; to institute civil investigation and public civil suit to protect public and social property, the environment and other decentralised and collective interests; to exercise external control over police activities; and to request investigatory procedures and the institution of police investigation⁷²¹.

⁷¹⁹ In Portuguese, it is called “*Procurador-Geral da República*”, which is sometimes translated into English as “Attorney-General of the Republic”.

⁷²⁰ There is also a National Council of the Public Prosecution, headed by the General Prosecutor of the Republic, whose plural composition and duties are similar to those of the National Council of Justice (see article 130-A of the Constitution).

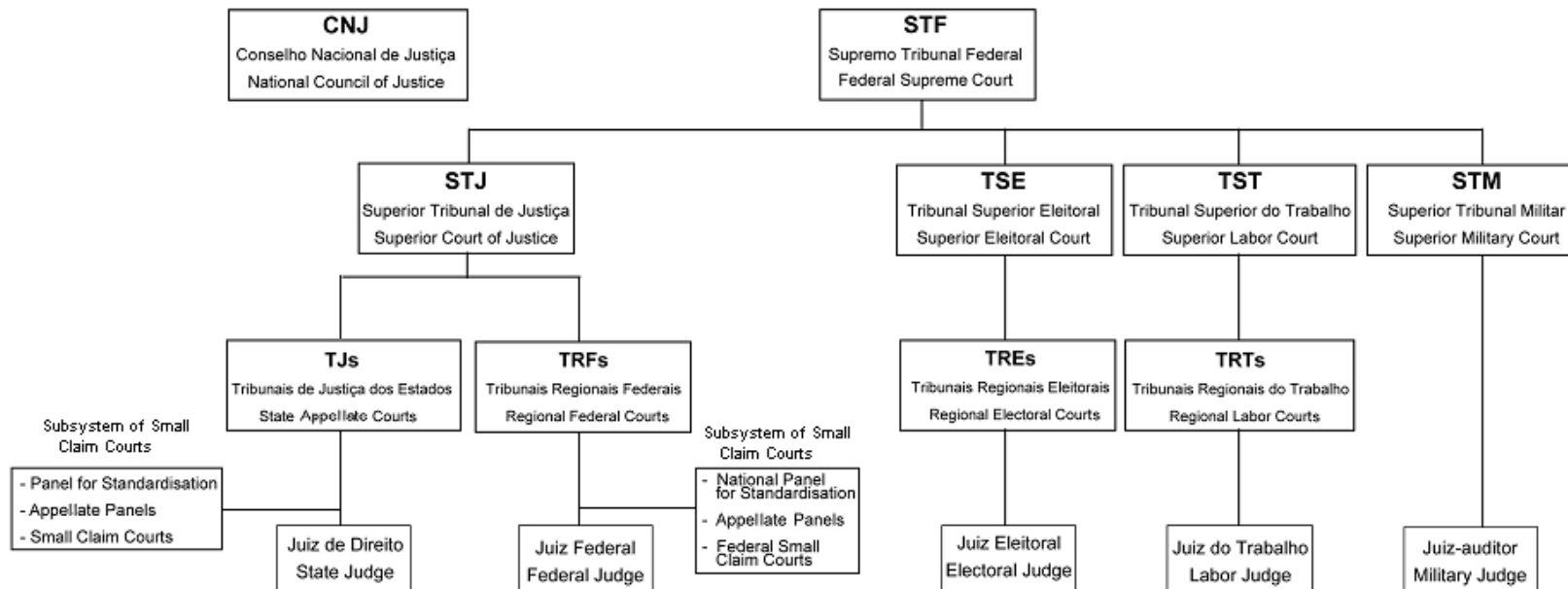
⁷²¹ To fulfil their duties appropriately, prosecutors also have guarantees and prohibitions similar to those of judges (§ 6º of article 128 of the Constitution).

The Constitution (article 134) also establishes the Public Legal Defence, an essential institution to the jurisdictional function of the State, which is responsible for the judicial guidance and the defence of the needy. The Federal Union and all states have their respective Public Legal Defence services.

There is also in Brazil a very organized public advocacy. The Advocacy-General of the Union, for instance, represents the Union judicially and is responsible for the activities of judicial consultation and assistance to the Executive Power (article 131 of the Constitution). It is headed by the Advocate-General of the Union. All states have also the respective agencies to represent them judicially.

Concerning the legal advocacy in general, the article 133 of the Constitution states the lawyer is indispensable to the administration of justice. This legal profession is organised (and supervised) nationally under the Brazilian BAR Association ("OAB"). The BAR Association is also present in each state of the Federation under the respective subsections.

Organogram of the Brazilian Judicial Power



Appendix II – List of the Statements of the Federal Supreme Court Binding *Súmula*⁷²²

Súmula Vinculante 1

Ofende a garantia constitucional do ato jurídico perfeito a decisão que, sem ponderar as circunstâncias do caso concreto, desconsidera a validade e a eficácia de acordo constante de termo de adesão instituído pela Lei Complementar nº 110/2001.

Fonte de Publicação

DJe nº 31 de 6/6/2007, p. 1.

DJ de 6/6/2007, p. 1.

DOU de 6/6/2007, p. 1.

Legislação

Constituição Federal de 1988, art. 5º, XXXVI.

Lei Complementar 110/2001.

Precedentes

RE 418918

RE 427801 AgR-ED

RE 431363 AgR

Súmula Vinculante 2

É inconstitucional a lei ou ato normativo estadual ou distrital que disponha sobre sistemas de consórcios e sorteios, inclusive bingos e loterias.

Fonte de Publicação

DJe nº 31 de 6/6/2007, p. 1.

DJ de 6/6/2007, p. 1.

DOU de 6/6/2007, p. 1.

Legislação

Constituição Federal de 1988, art. 22, XX.

Precedentes

ADI 2847

ADI 3147

ADI 2996

ADI 2690

ADI 3183

ADI 3277

⁷²² See Supremo Tribunal Federal. *Enunciados da Súmula vinculante 1 a 29, 31 e 32*. <<http://www.stf.jus.br/portal/cms/verTexto.asp?servico=jurisprudenciaSumulaVinculante>> accessed 23 July 2012.

Súmula Vinculante 3

Nos processos perante o Tribunal de Contas da União asseguram-se o contraditório e a ampla defesa quando da decisão puder resultar anulação ou revogação de ato administrativo que beneficie o interessado, excetuada a apreciação da legalidade do ato de concessão inicial de aposentadoria, reforma e pensão.

Fonte de Publicação

DJe nº 31 de 6/6/2007, p. 1.

DJ de 6/6/2007, p. 1.

DOU de 6/6/2007, p. 1.

Legislação

Constituição Federal de 1988, art. 5º, LIV e LV; art. 71, III.

Lei 9.784/1999, art. 2º.

Precedentes

MS 24268

MS 24728

MS 24754

MS 24742

Súmula Vinculante 4

Salvo nos casos previstos na Constituição, o salário mínimo não pode ser usado como indexador de base de cálculo de vantagem de servidor público ou de empregado, nem ser substituído por decisão judicial.

Fonte de Publicação

DJe nº 83 de 9/5/2008, p. 1.

DOU de 9/5/2008, p. 1.

Legislação

Constituição Federal de 1988, art. 7º, IV e XXIII; art. 39, § 1º e § 3º; art. 42, § 1º; art. 142, § 3º, X.

Precedentes

RE 236396

RE 208684

RE 217700

RE 221234

RE 338760

RE 439035

RE 565714

Súmula Vinculante 5

A falta de defesa técnica por advogado no processo administrativo disciplinar não ofende a Constituição.

Fonte de Publicação

DJe nº 88 de 16/5/2008, p. 1.

DOU de 16/5/2008, p. 1.

Legislação

Constituição Federal de 1988, art. 5º, LV.

Precedentes

RE 434059

AI 207197 AgR

RE 244027 AgR

MS 24961

Súmula Vinculante 6

Não viola a Constituição o estabelecimento de remuneração inferior ao salário mínimo para as praças prestadoras de serviço militar inicial.

Fonte de Publicação

DJe nº 88 de 16/5/2008, p. 1.

DOU de 16/5/2008, p. 1.

Legislação

Constituição Federal de 1988, art. 1º, III; art. 5º, “caput”; art. 7º, IV; art. 142, § 3º, VIII, (redação

dada pela Emenda Constitucional 18/1998); art. 143, “caput”, § 1º e § 2º.

Medida Provisória 2.215/2001, art. 18, § 2º.

Precedentes

RE 570177

RE 551453

RE 551608

RE 558279

RE 557717

RE 557606

RE 556233

RE 556235

RE 555897

RE 551713

RE 551778

RE 557542

Súmula Vinculante 7

A norma do §3º do artigo 192 da Constituição, revogada pela Emenda Constitucional nº 40/2003, que limitava a taxa de juros reais a 12% ao ano, tinha sua aplicação condicionada à edição de lei complementar.

Fonte de Publicação

DJe nº 112 de 20/6/2008, p. 1.
DOU de 20/6/2008, p. 1.

Legislação

Constituição Federal de 1988, art. 192, §3º (redação anterior à Emenda Constitucional 40/2003).

Precedentes

RE 582650 QO
ADI 4
RE 157897
RE 184837
RE 186594
RE 237472
RE 237952
AI 187925 AgR

Súmula Vinculante 8

São inconstitucionais o parágrafo único do artigo 5º do Decreto-Lei nº 1.569/1977 e os artigos 45 e 46 da Lei nº 8.212/1991, que tratam de prescrição e decadência de crédito tributário.

Fonte de Publicação

DJe nº 112 de 20/6/2008, p. 1.
DOU de 20/6/2008, p. 1.

Legislação

Constituição Federal de 1988, art. 146, III.
Decreto-Lei 1.569/1977, art. 5º, parágrafo único.
Lei 8.212/1991, art. 45 e art. 46.

Precedentes

RE 560626
RE 556664
RE 559882
RE 559943
RE 106217
RE 138284

Súmula Vinculante 9

O disposto no artigo 127 da Lei nº 7.210/1984 (Lei de Execução Penal) foi recebido pela ordem constitucional vigente, e não se lhe aplica o limite temporal previsto no caput do artigo 58.

Fonte de Publicação

DJe nº 112 de 20/6/2008, p. 1.
DOU de 20/6/2008, p. 1.
Republicação: DJe nº 117 de 27/6/2008, p. 1.

DOU de 27/6/2008, p. 1.

Legislação

Constituição Federal de 1988, art. 5º, XXXVI e XLVI.
Lei 7.210/1984, art. 58, “caput”; art. 127.

Precedentes

RE 452994
HC 91084
AI 570188 AgR-ED
HC 92791
HC 90107
AI 580259 AgR

Súmula Vinculante 10

Viola a cláusula de reserva de plenário (CF, artigo 97) a decisão de órgão fracionário de tribunal que, embora não declare expressamente a inconstitucionalidade de lei ou ato normativo do poder público, afasta sua incidência, no todo ou em parte.

Fonte de Publicação

DJe nº 117 de 27/6/2008, p. 1.
DOU de 27/6/2008, p. 1.

Legislação

Constituição Federal de 1988, art. 97.

Precedentes

RE 482090
RE 240096
RE 544246
RE 319181
AI 472897 AgR

Súmula Vinculante 11

Só é lícito o uso de algemas em casos de resistência e de fundado receio de fuga ou de perigo à integridade física própria ou alheia, por parte do preso ou de terceiros, justificada a excepcionalidade por escrito, sob pena de responsabilidade disciplinar, civil e penal do agente ou da autoridade e de nulidade da prisão ou do ato processual a que se refere, sem prejuízo da responsabilidade civil do Estado.

Fonte de Publicação

DJe nº 157 de 22/8/2008, p. 1.
DOU de 22/8/2008, p. 1.

Legislação

Constituição Federal de 1988, art. 1º, III; art. 5º, III, X e XLIX.
Código Penal de 1940, art. 350.

Código de Processo Penal de 1941, art. 284.
Código de Processo Penal Militar de 1969, art. 234, § 1º.
Lei 4.898/1965, art. 4º, “a”.

Precedentes

RHC 56465
HC 71195
HC 89429
HC 91952

Súmula Vinculante 12

A cobrança de taxa de matrícula nas universidades públicas viola o disposto no art. 206, IV, da Constituição Federal.

Fonte de Publicação

DJe nº 157 de 22/8/2008, p. 1.
DOU de 22/8/2008, p. 1.

Legislação

Constituição Federal de 1988, art. 206, IV.

Precedentes

RE 500171
RE 542422
RE 536744
RE 536754
RE 526512
RE 543163
RE 510378
RE 542594
RE 510735
RE 511222
RE 542646
RE 562779

Súmula Vinculante 13

A nomeação de cônjuge, companheiro ou parente em linha reta, colateral ou por afinidade, até o terceiro grau, inclusive, da autoridade nomeante ou de servidor da mesma pessoa jurídica investido em cargo de direção, chefia ou assessoramento, para o exercício de cargo em comissão ou de confiança ou, ainda, de função gratificada na administração pública direta e indireta em qualquer dos Poderes da União, dos Estados, do Distrito Federal e dos Municípios, compreendido o ajuste mediante designações recíprocas, viola a Constituição Federal.

Fonte de Publicação

DJe nº 162 de 29/8/2008, p. 1.
DOU de 29/8/2008, p. 1.

Legislação

Constituição Federal de 1988, art. 37, “caput”.

Precedentes

ADI 1521 MC

MS 23780

ADC 12 MC

ADC 12

RE 579951

Súmula Vinculante 14

É direito do defensor, no interesse do representado, ter acesso amplo aos elementos de prova que, já documentados em procedimento investigatório realizado por órgão com competência de polícia judiciária, digam respeito ao exercício do direito de defesa.

Fonte de Publicação

DJe nº 26 de 9/2/2009, p. 1.

DOU de 9/2/2009, p. 1.

Legislação

Constituição Federal de 1988, art. 1º, III; art. 5º, XXXIII, LIV e LV.

Código de Processo Penal de 1941, art. 9º e art. 10.

Lei 8.906/1994, art. 6º, parágrafo único; art. 7º, XIII e XIV.

Precedentes

HC 88520

HC 90232

HC 88190

HC 92331

HC 87827

HC 82354

HC 91684

Súmula Vinculante 15

O cálculo de gratificações e outras vantagens do servidor público não incide sobre o abono utilizado para se atingir o salário mínimo.

Fonte de Publicação

DJe nº 121 de 1º/7/2009, p. 1.

DOU de 1º/7/2009, p. 1.

Legislação

Constituição Federal de 1988, art. 7º, IV.

Precedentes

RE 439360 AgR

RE 518760 AgR

RE 548983 AgR
RE 512845 AgR
RE 490879 AgR
RE 474381 AgR
RE 436368 AgR
RE 572921 RG-QO

Súmula Vinculante 16

Os artigos 7º, IV, e 39, § 3º (redação da EC 19/98), da Constituição, referem-se ao total da remuneração percebida pelo servidor público.

Fonte de Publicação

DJe nº 121 de 1º/7/2009, p. 1.
DOU de 1º/7/2009, p. 1.

Legislação

Constituição Federal de 1988, art. 7º, IV; art. 39, § 2º (redação anterior à Emenda Constitucional 19/1998); art. 39, § 3º (redação dada pela Emenda Constitucional 19/1998).

Precedentes

RE 199098
RE 197072
RE 265129
AI 492967 AgR
AI 601522 AgR
RE 582019 RG-QO

Súmula Vinculante 17

Durante o período previsto no parágrafo 1º do artigo 100 da Constituição, não incidem juros de mora sobre os precatórios que nele sejam pagos.

Fonte de Publicação

DJe nº 210 de 10/11/2009, p. 1.
DOU de 10/11/2009, p. 1.

Legislação

Constituição Federal de 1988, art. 100, § 1º (redação dada pela Emenda Constitucional 30/2000).
Constituição Federal de 1988, art. 100, § 5º (redação dada pela Emenda Constitucional 62/2009).

Precedentes

RE 591085 RG-QO
RE 298616
RE 305186
RE 372190 AgR

RE 393737 AgR
RE 589345
RE 571222 AgR
RE 583871

Súmula Vinculante 18

A dissolução da sociedade ou do vínculo conjugal, no curso do mandato, não afasta a inelegibilidade prevista no § 7º do artigo 14 da Constituição Federal.

Fonte de Publicação

DJe nº 210 de 10/11/2009, p. 1.
DOU de 10/11/2009, p. 1.

Legislação

Constituição Federal de 1988, art. 14, § 1º (redação dada pela Emenda Constitucional 16/1997) e § 7º.

Precedentes

RE 568596
RE 433460
RE 446999

Súmula Vinculante 19

A taxa cobrada exclusivamente em razão dos serviços públicos de coleta, remoção e tratamento ou destinação de lixo ou resíduos provenientes de imóveis, não viola o artigo 145, II, da Constituição Federal.

Fonte de Publicação

DJe nº 210 de 10/11/2009, p. 1.
DOU de 10/11/2009, p. 1.

Legislação

Constituição Federal de 1988, art. 145, II.

Precedentes

RE 576321 RG-QO
RE 256588 ED-EDv
AI 476945 AgR
AI 460195 AgR
RE 440992 AgR
AI 481619 AgR
AI 684607 AgR
RE 273074 AgR
RE 532940 AgR
RE 411251 AgR
RE 481713 AgR
RE 473816 AgR

AI 457972 AgR
RE 393331 AgR
AI 459051 AgR
RE 362578 AgR
RE 206777

Súmula Vinculante 20

A Gratificação de Desempenho de Atividade Técnico-Administrativa – GDATA, instituída pela Lei nº 10.404/2002, deve ser deferida aos inativos nos valores correspondentes a 37,5 (trinta e sete vírgula cinco) pontos no período de fevereiro a maio de 2002 e, nos termos do artigo 5º, parágrafo único, da Lei nº 10.404/2002, no período de junho de 2002 até a conclusão dos efeitos do último ciclo de avaliação a que se refere o artigo 1º da Medida Provisória no 198/2004, a partir da qual passa a ser de 60 (sessenta) pontos.

Fonte de Publicação

DJe nº 210 de 10/11/2009, p. 1.
DOU de 10/11/2009, p. 1.

Legislação

Constituição Federal de 1988, art. 40, § 8º (redação dada pela Emenda Constitucional 20/1998).

Precedentes

RE 476279
RE 476390
RE 597154 RG-QO

Súmula Vinculante 21

É inconstitucional a exigência de depósito ou arrolamento prévios de dinheiro ou bens para admissibilidade de recurso administrativo.

Fonte de Publicação

DJe nº 210 de 10/11/2009, p. 1.
DOU de 10/11/2009, p. 1.

Legislação

Constituição Federal de 1988, art. 5º, XXXIV, “a”, e LV.

Precedentes

RE 388359
RE 389383
RE 390513
AI 398933 AgR
AI 408914 AgR
ADI 1976
AI 698626 RG-QO
RE 370927 AgR

AI 431017 AgR
RE 504288 AgR
AC 1887 MC
AI 351042 AgR-ED
AI 649432
RE 563844
AI 687411

Súmula Vinculante 22

A Justiça do Trabalho é competente para processar e julgar as ações de indenização por danos morais e patrimoniais decorrentes de acidente de trabalho propostas por empregado contra empregador, inclusive aquelas que ainda não possuíam sentença de mérito em primeiro grau quando da promulgação da Emenda Constitucional no 45/04.

Fonte de Publicação

DJe nº 232 de 11/12/2009, p. 1.
DOU de 11/12/2009, p. 1.

Legislação

Constituição Federal de 1988, art. 7º, XXVIII; art. 109, I; art. 114.

Precedentes

CC 7204
AI 529763 AgR-ED
AI 540190 AgR
AC 822 MC

Súmula Vinculante 23

A Justiça do Trabalho é competente para processar e julgar ação possessória ajuizada em decorrência do exercício do direito de greve pelos trabalhadores da iniciativa privada.

Fonte de Publicação

DJe nº 232 de 11/12/2009, p. 1.
DOU de 11/12/2009, p. 1.

Legislação

Constituição Federal de 1988, art. 114, II.

Precedentes

RE 579648
CJ 6959
RE 238737
AI 611670
AI 598457
RE 555075
RE 576803

Súmula Vinculante 24

Não se tipifica crime material contra a ordem tributária, previsto no art. 1º, incisos I a IV, da Lei nº 8.137/90, antes do lançamento definitivo do tributo.

Fonte de Publicação

DJe nº 232 de 11/12/2009, p. 1.

DOU de 11/12/2009, p. 1.

Legislação

Constituição Federal de 1988, art. 5º, LV; art. 129, I.

Código Penal de 1940, art. 14, I; art. 111, I.

Código Tributário Nacional de 1966, art. 142, "caput".

Lei 8.137/1990, art. 1º, I, II, III e IV.

Lei 9.430/1996, art. 83.

Lei 10.684/2003, art. 9º, § 2º.

Precedentes

HC 81611

HC 85185

HC 86120

HC 83353

HC 85463

HC 85428

Súmula Vinculante 25

É ilícita a prisão civil de depositário infiel, qualquer que seja a modalidade do depósito.

Fonte de Publicação

DJe nº 238 de 23/12/2009, p. 1.

DOU de 23/12/2009, p. 1.

Legislação

Constituição Federal de 1988, art. 5º, LXVII e § 2º.

Convenção Americana sobre Direitos Humanos (Pacto de S. José da Costa Rica), art. 7º, § 7º.

Pacto Internacional sobre Direitos Civis e Políticos, art. 11.

Precedentes

RE 562051 RG

RE 349703

RE 466343

HC 87585

HC 95967

HC 91950

HC 93435

HC 96687 MC

HC 96582
HC 90172
HC 95170 MC

Súmula Vinculante 26

Para efeito de progressão de regime no cumprimento de pena por crime hediondo, ou equiparado, o juízo da execução observará a inconstitucionalidade do art. 2º da Lei n. 8.072, de 25 de julho de 1990, sem prejuízo de avaliar se o condenado preenche, ou não, os requisitos objetivos e subjetivos do benefício, podendo determinar, para tal fim, de modo fundamentado, a realização de exame criminológico.

Fonte de Publicação

DJe nº 238 de 23/12/2009, p. 1.
DOU de 23/12/2009, p. 1.

Legislação

Constituição Federal de 1988, art. 5º, XLVI, XLVII.
Código Penal de 1940, art. 33, § 3º; art. 59.
Lei 7.210/1984, art. 66, III, "b".
Lei 8.072/1990, art. 2º.

Precedentes

HC 82959
AI 504022 EDv-AgR
AI 460085 EDv-AgR
AI 559900 EDv-AgR
HC 90262
HC 85677 QO
RHC 86951
HC 88231
HC 86224

Súmula Vinculante 27

Compete à Justiça estadual julgar causas entre consumidor e concessionária de serviço público de telefonia, quando a ANATEL não seja litisconsorte passiva necessária, assistente, nem opoente.

Fonte de Publicação

DJe nº 238 de 23/12/2009, p. 1.
DOU de 23/12/2009, p. 1.

Legislação

Constituição Federal de 1988, art. 98, I; art. 109, I.

Precedentes

RE 571572
AI 650085 AgR

AI 607035 AgR
AI 600608 AgR
AI 631223 AgR
AI 662330 AgR
RE 549740 AgR
RE 525852 AgR
RE 540494 AgR
AI 657780 AgR

Súmula Vinculante 28

É inconstitucional a exigência de depósito prévio como requisito de admissibilidade de ação judicial na qual se pretenda discutir a exigibilidade de crédito tributário.

Fonte de Publicação

DJe nº 28 de 17/2/2010, p. 1.
DOU de 17/2/2010, p. 1.

Legislação

Constituição Federal de 1988, art. 5º, XXXV, LV.
Lei 8.870/1994, art. 19.

Precedentes

ADI 1074

Súmula Vinculante 29

É constitucional a adoção, no cálculo do valor de taxa, de um ou mais elementos da base de cálculo própria de determinado imposto, desde que não haja integral identidade entre uma base e outra.

Fonte de Publicação

DJe nº 28 de 17/2/2010, p. 1.
DOU de 17/2/2010, p. 1.

Legislação

Constituição Federal de 1988, art. 145, § 2º.

Precedentes

RE 576321 RG-QO
RE 232393
RE 177835
AI 441038 AgR
RE 346695 AgR
RE 241790
ADI 1926 MC
RE 491216 AgR
RE 220316

Súmula Vinculante 31

É inconstitucional a incidência do Imposto sobre Serviços de Qualquer Natureza – ISS sobre operações de locação de bens móveis.

Fonte de Publicação

DJe nº 28 de 17/2/2010, p. 1.

DOU de 17/2/2010, p. 1.

Legislação

Código Tributário Nacional de 1966, art. 71, § 1º; art. 97, I e III.

Decreto-lei 406/1968, art. 8º e item 79.

Lei Complementar 56/1987.

Precedentes

RE 116121

RE 455613 AgR

RE 553223 AgR

RE 465456 AgR

RE 450120 AgR

RE 446003 AgR

AI 543317 AgR

AI 551336 AgR

AI 546588 AgR

Súmula Vinculante 32

O ICMS não incide sobre alienação de salvados de sinistro pelas seguradoras.

Fonte de Publicação

DJe nº 37 de 24/2/2011, p. 1.

DOU de 24/2/2011, p. 1.

Legislação

Constituição Federal de 1988, art. 22, VII; art. 153, V.

Precedentes

ADI 1390 MC

ADI 1332 MC

ADI 1648

RE 588149